













# REPORTS OF CASES

ADJUDGED IN THE

# COURT OF CHANCERY

OF

UPPER CANADA,

COMMENCING DECEMBER, 1866.

BY

ALEXANDER GRANT, BARRISTER,

REPORTER TO THE COURT.

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IN CHANCERY.

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ORDERS OF COURT.

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AUGUST 31, 1867.

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1. Under the Act for Quieting Titles to Real Estate in Upper Canada the petition for an investigation of title is not to include two or more properties dependent on separate and distinct titles ; but may include any number of lots or parcels belonging to the same person and dependent on one and the same chain of title.

2. Where an application is made under the 2nd section of the Act, the Registrar is to attend one of the Judges with the petition for directions, before the same is referred for investigation.

3. A petition under the Act may, at the option of the Petitioner, be referred to any of the Officers of the Court at Toronto, or to any Convey-

ancing Counsel, who may from time to time be designated by the Court for the purpose ; or to any of the following local Masters, viz., the Masters at Barrie, Belleville, Brantford, Brockville, Cobourg, Cornwall, Goderich, Guelph, Hamilton, Kingston, Lindsay, London, Owen Sound, Peterborough, Sandwich, Sarnia, Simcoe, Stratford, St. Catharines, Whitby, and Woodstock ; or to any other of the local Masters who shall hereafter be designated.

4. To facilitate the proceedings in cases referred to the local Masters, two Inspectors of Titles will be named by the Court, for the purposes, and with the powers, mentioned in, and provided for by, the 25th and 26th sections of the said Act ; and on the petition are to be endorsed the names of one of the Inspectors, and of the local Master, thus : “ To be referred to the Master at                      and to Mr. Inspector of Titles.”

5. Petitions filed unindorsed with the name of a Referee are to be referred to the Referees in Toronto in rotation, or otherwise as the Court from time to time directs ; but a Petition indorsed with the name of any Referee is to be referred to him accordingly, unless the Court otherwise directs.

6. Where the Petitioner desires the reference to a local Master, the Petition is to be entered with the Inspector of Titles before being filed

with the Registrar as required by the Statute, and the Inspector is to note thereon the day of entering the same, adding to such note his own initials, and is thereupon to deliver the Petition to the Solicitor, or, if duly stamped, to the Registrar, to be filed.

7. The local Master shall be entitled to confer or correspond from time to time with the Inspector of Titles, for advice and assistance on questions of practice or evidence, or other questions arising under the Act or under these Orders.

8. The Registrar is to deliver to the party filing a Petition under the Act, a certificate of the filing thereof, for registration in the proper County ; and thereupon the Petition is forthwith to be referred, and delivered or posted by the Registrar, to the Referee named for that purpose.

9. The particulars necessary under the 5th section of the Act to support the Petition are to be delivered or sent by the Petitioner or his Solicitor to the Referee, and are to be forthwith examined and considered by him.

10. In every case of an investigation of the title to property under the said Act, the petitioner is to shew, by affidavit or otherwise, whether possession has always accompanied the title under which he claims the property, or how otherwise, or is to shew some sufficient reason for dispensing with such proof either wholly or in part.

11. Where there is no contest, the attendance of the Petitioner, or of any Solicitor on his behalf, is not to be required on the examination of the title, except where, for any special reason, the Referee directs such attendance.

12. If, on such examination as aforesaid, the Referee finds the proof of title defective, he is to deliver or mail to the Petitioner, or to his Solicitor or Agent, a memorandum of such finding, stating shortly therein what the defects are.

13. When the Referee finds that a good title is shewn, he is to prepare the necessary advertisement, and the same is to be published in the *Official Gazette* and in any other newspaper or newspapers in which the Referee thinks it proper to have the same inserted; and a copy of the advertisement is also to be put up on the door of the Court House of the County where the land lies, and in some conspicuous place in the Post Office which is situate nearest to the property the title of which is under investigation; and the Referee is to endorse on the advertisement so prepared by him the name or names of the newspaper or newspapers in which the same is to be published, and the number of insertions to be given therein respectively, and the period (not less than four weeks) for which the notice is to be continued at the Court House and Post Office respectively.

14. Any notice of the application to be

served or mailed under the 14th section of the Act, is to be prepared by the Referee; and directions are in like manner to be given by him as to the persons to be served with such notice, and as to the mode of serving the same.

15. The Inspectors and Toronto Referees are from time to time to confer with one of the Judges in respect of matters before such Inspectors and Toronto Referees, as there shall be occasion.

16. When any person has shewn himself, in the opinion of a local Master, to be entitled to a Certificate or Conveyance under the Act, and has published and given all the notices required, the Master is to write at the foot of the petition, and sign, a memorandum to the effect following: "I am of opinion that the Petitioner is entitled to a Certificate of Title (*or Conveyance*) as prayed" (*or subject to the following incumbrances, &c., as the case may be*); and is to transmit the Petition (if by mail, the postage being prepaid), with the deeds, evidence, and other papers before him in reference thereto, to the Inspector of Titles with whom the Petition was entered; and the Inspector is to examine the same carefully, and should he find any defect in the evidence of title, or in the proceedings, he is, by correspondence or otherwise, to point the same out to the Petitioner, or his Solicitor, or to the Master, as the case may be, in order that the defect may be remedied before a Judge

is attended with the Petition and papers for approval.

17. When the Inspector, or other Referee (not being a local Master), finds that the Petitioner has shewn himself entitled to a Certificate of Title, or a Conveyance under the Act, and has published and given all the notices required, the Inspector, or Referee (not being a local Master), is to prepare the Certificate of Title, or Conveyance, and is to engross the same in duplicate, one on parchment, and one on paper ; and is to sign the same respectively at the foot or in the margin thereof ; and is to attend one of the Judges therewith, and with the deeds, evidence, and other papers before him in reference thereto ; and on the Certificate or Conveyance being signed by the Judge, the Inspector or other Referee aforesaid, as the case may be, is to transmit or deliver the same to the Registrar, to be signed and registered by him ; and the Registrar is to deliver or transmit the same, when so signed and registered, to the Petitioner, his Solicitor, or Agent, for registration in the proper County.

18. When a Certificate of Title or Conveyance under the Act has been granted, the Inspector or Referee may, without further order, deliver, on demand, to the party entitled thereto, or his Solicitor, all deeds and other evidences of title, not including affidavits made, and evidence given, in the matter of the title ; and is to take his receipt therefor.

19. Each of the Inspectors and other Toronto Referees is to keep a Book, and to preserve therein a copy of all his letters under these Orders, and is to prepare monthly, for the information of the Profession, a memorandum of points of practice decided in matters under the Act.

20. The fees of Solicitors and Counsel, and the fees payable by stamps, for proceedings under the said Act, are, respectively, to be the same as for like proceedings in other cases.

21. The Referee is, in lieu of all other fees, to be entitled to a fee of fifty cents for every deed in the chain of title, other than satisfied mortgages; and Referees who prepare the Certificate or Conveyance, are to have a fee of \$4 for drawing and engrossing the same in duplicate. Besides these fees, the Referee is to have the same fees in respect of proceedings occasioned by any defects in the proof of title, which shall be mentioned in the Referee's memorandum referred to in the 12th of these Orders, as are payable to the Master in respect of similar proceedings in suits. No further or other fee is to be payable to the Referee in respect of any of the proceedings by or before him under the said Act in an uncontested case.

22. In a contested case, the Referee is, in addition, to be entitled, in respect of the proceedings occasioned by the contest, to the same

fees therefor as are payable to him for the like proceedings in suits.

23. The fee of the Inspector of Titles on entering the Petition with him is \$3, and no further fee is to be paid him for correspondence, examination of the title, drawing and engrossing certificate or conveyance, or for any other matter or thing done under the petition.

24. The Applicant or his Solicitor is to pay, or prepay, as the case may be, all postages and other expenses of transmitting letters or papers.

25. Petitions under the 35th section of the Act are to be filed and proceeded with in the same manner (as nearly as may be) as petitions for an indefeasible title ; and the fees of Officers, Solicitors, and Counsel, are to be the same as in respect of the like proceedings in suits.

26. The orders of the 19th of September, 1865, are hereby rescinded.

P. M. VANKOUGHNET, C.  
J. G. SPRAGGE, V. C.  
O. MOWAT, V. C.

REPORTS OF CASES  
ADJUDGED IN THE  
COURT OF CHANCERY  
OF  
UPPER CANADA,

COMMENCING JANUARY, 1867.

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VANCE v. CUMMINGS.

*Registry Act—Unpatented Lands.*

Registration is now notice of all instruments registered before, as well as since, registration was made notice.

Since the passing of the Consolidated Statutes, registration of a mortgage of unpatented lands, under the Statute 8 Victoria, ch. 8, sec. 9, is notice to subsequent purchasers, whether the patent has issued under or without a decision of the Heir and Devisee Commissioners.

Hearing at Guelph at the sittings held there in the autumn of 1866.

Mr. Moss, for the plaintiff, cited *Holland v. Moore* (a). Statement.

Mr. Crooks, Q. C., for defendant, referred to *Street v. The Commercial Bank* (b), *The Bank of Upper Canada v. Brough* (c), *Henderson v. Graves* (d), *Horden v. Nichols* (e), *Torrell v. Nash* (f), *Malone v. King* (g), *Chambers v. Howell* (h), *Douglas v. Ward* (i).

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(a) 12 Gr. 296.

(c) 2 U. C. App. Rep., 95.

(e) 3 Atk.

(g) 2 Dr. and War. 31.

(b) 1 Gr. 169.

(d) 2 U. C. App. 9.

(f) 3 P. W. 306.

(h) 11 Beav. 6, 14.

(i) 11 Gr. 99.

1867. *MOWAT, V. C.*—The plaintiff is administratrix of *Jeremiah Vance*, deceased; and the bill is filed in respect of a mortgage from one *Joseph Searle* to the intestate, and prays a sale of the mortgaged property.

Vance  
v.  
Cummings.

The intestate was the locatee of the lot, having contracted for the purchase of it from the crown. On the 12th November 1857, he assigned his contract to *Searle*; and on the same day *Searle* executed to *Vance* the mortgage in question. This mortgage was registered the following day in the Registry Office of the county where the lands lies (a). On the 16th April, 1859, *Searle* assigned the contract to *James Dorwood*; on the 12th September, 1861, *Dorwood* assigned to *James Cummings*, who is proved to have had express notice of the mortgage before he took this assignment. *Cummings* obtained a patent for the lot in February 1863, and on the 1st February, 1865, he executed the deed under which the defendant *Martha Cummings*, his sister, now claims the property.

Judgment.

The assignments from *Searle* to *Dorwood*, and from *Dorwood* to *Cummings*, being admitted in the pleadings, are not produced: there is no admission or evidence that either of them was executed for value.

The evidence that the conveyance to the defendant was for value is that of another brother, who was the subscribing witness to the deed, and who deposes, that the defendant had kept house for her brother *James* for several years; that *James* had a great many hired men, most of whom boarded with him; that the defendant did all the work of the house; that he understood the deed was given to her to recompense her for her work; and that he heard a conversation between *James* and the defendant, in the fall before the deed was executed, in which *James* said

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(a) Vide *Holland v. Moore*, 12 Gr. 296.

he would give the defendant the lot in consideration of her work, if she was satisfied to take it; and that she said she was willing to take it.

1867.

Vance  
v.  
Cummings.

After executing the deed, and on the same day, *James* went to the United States for his health, leaving some debts unpaid, but (it is said) not owing much. He has not since returned. There is no evidence or allegation of any antecedent contract for paying the sister wages for her services (*a*). The deed to her states a money consideration; and no document or paper was executed shewing the real transaction to be what is now alleged; and nothing is known of the true consideration except what may be inferred from the conversation in the previous autumn.

The learned counsel for the plaintiff took several objections to the defence offered. One of these was that the registration of the mortgage was notice to all parties subsequently dealing in respect of the property; and, as my opinion on this point is in his favor, it is unnecessary to consider the other objections.

Judgment.

The mortgage was registered under the act 8 Vic., ch. 8, sec. 9. The effect of registration, according to that statute, was, apparently, confined to cases where the patent should afterwards be issued in pursuance of a decision by the heir and devisee commissioners; and I think it was argued that the commissioners had no jurisdiction in cases of purchases from the crown, their jurisdiction, it was said, being confined to claims to free grants—in which case the registration of the mortgage in question would not have been an authorized registration. But I find that the commissioners themselves have not held their jurisdiction to be so confined, and have been in the constant habit of adjudicating on cases of purchases from the crown, as well as other cases.

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(a) Vide *Douglass v. Ward*, 11 Gr. 89.

1867. The Registry Act, in the Upper Canada Consolidated Statutes, came into force on the 5th Dec., 1859, and it was thereby provided (a) that "the registry of any instrument \* \* \* affecting any lands or tenements registered under this or any former act, shall in equity constitute notice of such deed, conveyance, &c., to all persons claiming any interest in such lands or tenements subject to such registry."

Vance  
v.  
Cummings.

Now the mortgage in question having been legally registered under a former act, and both *James Cummings* and the defendant having acquired their interest after the passing of the Consolidated Statute, both must be held to have purchased with notice of the plaintiff's mortgage. The act was undoubtedly intended to make all past registrations, as well as future registrations, notice to persons dealing after the passing of the Consolidated Statute, in respect of the lands affected by such registrations.

Judgment

The defendant by her answer alleges, that part of the purchase money payable to the crown was paid by *Dorwood*, and part by *James Cummings*; and she claims that such payments constitute a first lien on the property, to the benefit of which she is entitled, should her defence of a purchase for value without notice fail. But she cannot make this claim unless *James Cummings*, her grantor, could have made it; and it is not pretended that *Dorwood*, on assigning to *Cummings*, had agreed to pay what was due the government; or that *Searle* had made any such agreement to pay when he assigned to *Dorwood*; or that *Vance* had done so when he assigned to *Searle*. I presume that each took his assignment subject to what was payable on the purchase from the crown: the mortgage to *Vance* contains absolute covenants for title. Under these circumstances, there is no pretence for this claim of the defendant; and, indeed

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(a) Ch. 89, sec. 47, p. 892.

though set up by the answer, I do not recollect that it was urged at the bar. 1867.

There must be the usual decree for a sale. The plaintiff may take an absolute order for the costs up to the hearing.

### SMITH V. BONNISTEEL.

*Will—Construction—Defence of purchase for value—Lapse of time.*

A testator, in an inartificially drawn will, directed his debts to be paid and bequeathed to his wife £125, to be paid her from the sale of his farm, which he required his executors to advertise and sell for the best price that could be obtained for it, and also retain possession, if she thought fit, in lieu of all dower and thirds, to have and to hold to her heirs and assigns forever. After giving legacies to his children, adding to each "to have and to hold to him, his heirs executors, administrators and assigns, for ever"—the testator willed and devised, that, should any assets remain in the hands of his executors after paying the foregoing Statement.  
devises, the same should be equally divided between his sons and daughters named, share and share alike :

*Held*, that the direction to sell was for the benefit of all the legatees, and not of the wife only.

The will devised as follows :—"My farm being lot No. 15, in the first concession of the township of Sidney"—this farm really consisted of this lot and the corresponding lot in the broken front concession :  
*Held*, that the devise covered both lots.

A person who purchases land from the heir with notice of the terms of the will, but under an erroneous supposition that, according to the true construction of the terms, the land was not affected by it, cannot set up, as against claimants under the will, the defence of a purchaser for value without notice.

A will disposed of the beneficial interest in land, but left the legal estate to descend to the heir :

*Held*, that lapse of time falling short of the statutory bar, was no defence by a purchaser from the heir-at-law.

This was a hearing at Belleville, in the autumn of 1866.

Mr. Crooks, Q. C., for the plaintiff, cited *Talbot v.*

1867. Earl Radnor (*a*), In re Terry's Will (*b*), Doe Beach v. The Earl of Jersey (*c*), Collyer v. Finch (*d*), Warren v. McKenzie (*e*), Jarman on Wills, ch. 14, page 362; Seton on Decrees, 224, 228, 229.

Smith  
v.  
Bonnisteel.

Mr. Blake, Q. C., and Mr. Moss for defendant, cited Lewis v. Lewellyn (*a*), Hall v. Fisher (*b*), Edgar v. Edgar (*c*), Wilson v. Eden (*d*), Doe Smith v. Galloway (*e*), Jameson v. McCallum (*f*), Morrell v. Fisher (*g*), Abbott v. Middleton (*h*), West v. Lawday (*i*), Doe Gildersleeve v. Kennedy (*j*), Carman v. Molson (*k*), Buchner v. Buchner (*l*), Doe Brown v. Greening (*m*), Ricketts v. Turquand (*n*), Harris v. Hyde (*o*), Webb v. Byng (*p*), Stanley v. Stanley (*q*), Webber v. Stanley (*r*), Dover v. Alexander (*s*), Evans v. Angell (*t*), Smith v. Ridgway (*u*), Goodtitle v. Southern (*v*), Hopkins v. Brown (*w*), Doe Tyrrell v. Lyford (*x*), Dickenson v. Teasdale (*y*), Scholfield v. Dickenson (*z*), Norris v. Le Neve (*aa*), Thompson v. Simpson (*bb*), Leary v. Rose (*cc*), Bevis v. Boulton (*dd*), and cases there cited.

Statement.

MOWAT, V. C.—The plaintiff claims as a *cestui que* trust under the will of one George Smith, who died on

(*a*) 3 M. & K. 252.

(*c*) 1 B. & Al. 550.

(*e*) 1 Gr. 905.

(*b*) 19 Beav. 580.

(*d*) 5 H. L. 436.

(*a*) 1 T. & R. 104.

(*c*) Cow. 379.

(*e*) 5 B. & Ad. 43, 51.

(*g*) 4 Exch. 591.

(*i*) 13 L. T. N. S. 171.

(*k*) 5 U. C. C. P. 124

(*m*) 3 M. & S. 171.

(*o*) 4 H. & N. 805.

(*q*) 2 J. & H. 491.

(*s*) 2 Hare, 275-283.

(*u*) 1 Law. R. Ex. 46.

(*w*) 10 U. C. Q. B. 125.

(*y*) 1 DeG. J. & S. 52.

(*aa*) 3 Atk. 82.

(*cc*) 10 Gr. 346.

(*b*) 1 Coll. 47.

(*d*) 11 Beav. 237.

(*f*) 18 U. C. Q. B. 445.

(*h*) 7 H. L. 88.

(*j*) 5 U. C. Q. B. 403.

(*l*) 6 U. C. C. P. 314.

(*n*) 1 H. L. 472.

(*p*) 1 K. & J. 580.

(*r*) 16 C. B. N. S. 698.

(*t*) 20 Beav. 202.

(*v*) 1 M. & S. 299.

(*x*) 4 M. & S. 550.

(*z*) 10 Gr. 226.

(*bb*) 2 J. & La. 110.

(*dd*) 7 Gr. 39.

the 6th January, 1847. The defendants are *Charles R. Bonnisteel*, the surviving executor, and *George Taylor*, who claims the property in question under the testator's heir-at-law. 1867.

Smith  
v.  
Bonnisteel.

The plaintiff's rights depends on the proper construction of the will; and the defendant's first contention is, that the plaintiff has no right under the will in respect of the real property.

The will, in the second clause, directs all the testator's just debts to be paid; and the third clause, is as follows: "I will and bequeath to my beloved wife, *Peggy Smith*, the sum of £125 of the lawful money of the Province of Canada; also, two beds and bedding, at her choice among all the beds that I may die possessed of; the said sum of £125 to be paid her from the sale of my farm, being lot No. 15, in the 1st concession of the Township of Sidney, which I require my executors herein- Judgment.  
after named, to advertise and sell for the best price that can be obtained for it; and also to retain possession, if she thinks fit so to do, in lieu of all dower and thirds: To have and to hold the same to her heirs and assigns forever." The testator then bequeaths legacies to his children respectively, adding to each legacy the words, "To have and to hold the same to him, his heirs, executors, administrators and assigns forever." Then follows this clause: "I will and devise that should any assets remain in the hands of my executors after paying the foregoing devises, that the same shall be equally divided between my sons *John Smith*, *Peter Smith*, *William Smith*, *Jacob Smith*, and *Philo Smith*, and my daughters *Peggy Bell*, *Amarilla Fraser*, and *Jane Farrer*, share and share alike."

The argument for the defendant is, that the only charge on the land is the legacy of the testator's widow; that a sale was not authorized except to pay this legacy;

1867. and that the proceeds, after paying the legacy, belonged, as a resulting trust, to the heir-at-law.

Smith  
v.  
Bonnisteel.

No authority was cited in support of this construction. The will is inartificially drawn, but I think the direction to sell was intended to be, as in terms it is, absolute, and not for the mere purpose of paying the widow's legacy; that all the legacies were, if necessary, to be paid out of it; and that what remained of the whole estate, including the proceeds of the sale of the farm, was to be divided equally among the children named in the residuary clause.

Judgment. The next and principal question argued was, whether the direction to sell embraced lot No. 15, broken front concession, as well as No. 15, in the first concession, the latter alone being specifically mentioned in the will. The executors and parties, on the death of the testator, assumed at first that both lots were included, but an attorney, living near, bought the interest of the heir-at-law, and claimed that the lot in the broken front did not pass by the will. The executors then took advice; and, being told that this was the true construction of the will, they sold the lot in the first concession only. The same attorney who had bought from the heir-at-law, became the purchaser at this sale; and the executors conveyed the lot to him on the 20th August, 1847. He sold and conveyed both lots to the defendant on the 5th May, following. The plaintiff alleges by the bill that both lots were to have been sold, and that the legal estate in both descended to the heir-at-law, subject to the provisions of the will (a).

The description in the will on which this claim is based, is the following:—"My farm being lot No. 15, in the first concession of the Township of Sidney."

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(a) Vide *Hopkins v. Brown*, 10 U. C. Q. B. 125.

It is clearly proved by the evidence that the testator's farm in fact consisted of the lot thus specified, together with lot No. 15, in the broken front concession; that these two lots constituted one farm at the time of the making of the will, and had done so always before, and have done so ever since; that there was and is no road between the two lots, and nothing to mark any boundary between them; that the testator's house, barns, and orchard were on the lot in the broken front; that there was no building on the lot specified in the will; that the testator himself had always used the two lots (including the road allowance between the two) as one farm; that the farm thus extended from the Bay of Quinte to the second concession, and was cleared from the bay back, so that the clearing comprised the whole of the broken front, and half of the lot in the first concession; that the main road crossed the broken front; that the house fronted on this road; and that it was by this road and no other that the testator got to his farm. 1867.  
Smith  
v.  
Bonnisteel,  
Judgment.

That the testator's farm consisted of the two lots being clear, is the effect of the expression "my farm" cut down by the testator's proceeding to specify but one of the lots of which his farm consisted? After looking into the authorities which were cited, I am clear that I must answer this question in the negative. The maxim of *falsa demonstratio* clearly applies; and I need do no more than cite the explanation of that maxim by the Lord Chancellor in the House of Lords in the late case of *West v. Lawday* (a), every word of which is pertinent to the case before me. "That maxim," said his Lordship, "is applicable to a case where some subject matter is devised as a whole under a denomination which is applicable to the entire land, and then the words of description that include and denote the entire subject-matter, are followed by words which are added on the principle of enumeration, but do not completely enu-

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(a) 11 H. L. 385.

1867. merate and exhaust all the particulars which are comprehended and included within the antecedent, universal, or generic denomination. Then the ordinary principle and rule of law, which is perfectly consistent with common sense and reason, is this: that the entirety which has been expressly and definitely given, shall not be prejudiced by an imperfect and inaccurate enumeration of the particulars of the specific gift." (a)

Smith  
v.  
Bonnistee.

The cases bearing on the question are very numerous, and it would be tedious to go through them all, but I may say, in general, that all those which were cited as in favor of the defendant, seem to me clearly distinguishable from the present.

Judgment. Then it was said that the defendant had bought without notice of the plaintiff's claim. But he had notice of the will, and of facts which were abundantly sufficient to show that the farm of the testator comprised at the time the will was made, and long before, the two lots. He was under a misapprehension as to the effect of the devise; but, this being matter of law, the error does not entitle him to set up the defence of a purchaser without notice.

The lapse of time was also urged as an answer to the plaintiff's suit, and it was contended that delay for less than twenty years, may, in this case, be a bar. The cases referred to in support of this contention, were of bills to set aside purchases by trustees, and the like, which may or may not be set aside according to circumstances; but such cases have no application to a case like the present. In *Penny v. Allen*, (b) the Lord Chancellor stated the rule thus: "As to the other point, namely, lapse of time, I think there is nothing in it. Mere lapse of time does not bar in equity,

(a) Vide also *Doe v. Earl of Jersey*, 1 B. & Ald, 550, *Goodtittle v. Southern*, 1 M. & S. 299.

(b) *D. G., McN. & G.*, 426.

any more than at law; it is an ingredient which, with other circumstances, may lead the court to draw inferences unfavourable to the claim of a party who has let twenty, or nearly twenty, years elapse without asserting his right. It may in such a case, be supposed that, if he had proceeded earlier, the facts might have been more clearly shewn, but there is nothing here to lead to such a supposition." (*a*)

1867.  
 Smith  
 v.  
 Bonnisteel.

I think, therefore, that the plaintiff is entitled to a decree.

The defendant has made extensive improvements on the property, of which, so far as may be consistent with justice to the legatees, he should have the benefit. I think the plaintiff is entitled to have a sale of the property at once; and the proper application of the proceeds can best be determined on further directions. As the defendant claims for improvements, I must also direct inquiry as to occupation rent, which otherwise would probably have been unnecessary (*b*); but I say nothing as to the decree to be ultimately made in respect thereof, when all the facts to be reported upon are before the court.

Judgment.

The decree will, therefore, direct a sale of the property: refer it to the Master at Belleville, to inquire what would be a fair occupation rent during defendant's occupation, and what portion thereof arises in consequence of the defendant's improvements: to take an account of such improvements: and to inquire and state to what amount, and in what proportion, they have enhanced the value of the property: also, to enquire whether any other persons are now entitled to any of the proceeds of the sale under the will (*c*); and the

(*a*) See *Dickenson v. Teasdale*, 1 D. G. J. & S., 52.

(*b*) Vide *Hicks v. Sallitt* 3 D. G. McN. & G., 813; *Thomas v. Thomas*, 2 K. & J., 79.

(*c*) Vide *Story v. Gape*, 2 Jur. N. S. 706.

1867. Master is, if necessary, to make such persons parties to the suit. Liberty to state special circumstances at the request of either party. Further directions and costs are reserved.

### GARRETT V. JOHNSTONE.

#### *Principal and surety.*

A debtor gave a mortgage to his creditor as collateral security for a debt for which another person (H.) was surety. The creditor afterwards obtained judgments against the surety (H.) for the debt, and placed an execution in the Sheriff's hands against his goods. A creditor of the surety subsequently placed an execution in the same Sheriff's hands; and, there not being goods enough to pay both executions, he paid off the first execution and took an assignment of the mortgage:

*Held*, that he was entitled to hold the mortgage to the extent of such payment, as against the plaintiff to whom the surety (H.), after both executions were delivered to the Sheriff, had assigned his interest in the mortgage to secure another debt.

Hearing at Hamilton, 13th November, 1866, before Vice Chancellor Mowat.

Mr. *Strong*, Q. C., and Mr. *Burton*, Q. C., for plaintiff.

Statement. Mr. *Blake*, Q.C., for defendant *Birrell*.

Mr. *Proudfoot* for defendant *Sage*.

*Topping v. Joseph (a)*, and *Moore v. VanBrocklin (b)* were referred to.

No one appeared for the defendant *Johnstone*.

MOWAT, V. C.—On the 8th November, 1862, the defendant *Francis Johnstone* executed a mortgage to the defendant *John Birrell*, on certain real property

therein described, to secure any debt that he should owe the mortgagee. For this debt *Henry Johnstone*, one of the defendants to the present suit, was then, or became afterwards, a surety for a debt so secured to the mortgagee, and was, therefore, by the law of this court, entitled to the benefit of the mortgage for his indemnification.

1867.  
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 Garrett  
 v.  
 Johnston.

*Birrell* subsequently recovered a judgment against *Henry Johnstone* and one *Baptiste Johnstone*, also a surety for *Francis*; and on the 2nd December, 1863, placed a writ against their goods in the hands of the Sheriff of Brant, endorsed to levy \$797 48 for debt, \$26 09 for costs taxed, with interest on both sums from the 20th June, 1863, \$10 for writs, and Sheriff's fees and expenses. The goods of *Henry* were seized under this writ.

On the 19th October, 1864, and before any sale had taken place, the defendant *Seymour Sage* put into the same Sheriff's hands a writ against the goods of *Henry*, indorsed to levy \$1,042 90, besides costs, interest, and Sheriff's fees. This gave *Sage* a right, in case there were not goods enough to pay both executions, to claim the benefit of the mortgage which *Birrell* held against *Francis*, to the extent that *Birrell* should apply the goods of *Henry*, who was a mere surety for *Francis*, to pay his debt secured by the mortgage.

Judgment

Subsequently, viz., on the 13th Dec. 1864, by deed of that date, *Henry Johnstone*, being indebted to the plaintiff in the sum of \$540, assigned to him all his interest in the mortgage in question, to secure this debt and interest. The effect of this assignment was to give the plaintiff all the interest of *Henry* in the mortgage, subject to the equity which *Sage* had acquired.

The evidence is contradictory as to what took place between *Birrell* and the plaintiff's agent when this

1867. transaction was communicated to the former, but as I do not think the statement of either side, though admitted to be true, would vary the rights of the parties, it is not necessary to compare what is said on the subject by the different witnesses.

Garrett  
v.  
Johnstone.

A peremptory sale of the goods of *Henry*, under the executions, was advertised for the 16th March, 1865; and on that day, but before the sale took place, *Sage*, under an arrangement with *Birrell*, paid him the amount due on his execution for debt and interest, then amounting, it appears, to \$248 11, exclusive of Sheriff's fees and Solicitor's costs. The sale then proceeded. *Sage* purchased most of the goods; and subsequently settled with *Birrell* in respect of the Sheriff's fees, and Solicitor's costs. On the 30th March, 1865, *Birrell* assigned to him the mortgage in pursuance of the previous arrangement between them.

Judgment.

Under these circumstances, I think it clear that *Sage* is entitled to hold the mortgage as a security for the amount which he had to pay in order to satisfy, or obtain the control of, *Birrell's* execution; and that *Birrell* was guilty of no wrong in assigning to *Sage* the mortgage on receiving such payment.

*Topping v. Joseph (a)* was referred to as opposed to this view. But the circumstances of that case were peculiar, and the doctrines of equity on which the decree I am about to make proceeds, are clear and well settled: I cannot treat that case as an authority that conflicts with them.

The decree will refer it to the Master at Hamilton, to tax to all parties, except *Francis Johnstone*, their costs of this suit; and to take the following accounts:

1. An account of what is due by *Francis* on the mortgage to *Birrell*. 1867.

Garrett  
v.  
Johnstone.

2. An account of what is due to *Sage* in respect of the amount necessarily paid by him on *Birrell's* execution, after his own writ had been delivered to the Sheriff.

3. An account of what is due the plaintiff in respect of the debt for which *Henry Johnstone* assigned the mortgage to him.

*Francis*, in six months after the report, is to pay *Sage* the amount found due to him, and his costs, and to pay the plaintiff the balance payable by him, and also the plaintiff's costs: and if there is more than enough due from him to pay both, he is to pay the balance to *Henry (a)*. On default, a sale, as prayed: and payment in same order out of the proceeds.

Judgment.

The bill must be dismissed against *Birrell* with costs, to be paid by the plaintiff; as the evidence has failed to establish that he is a necessary party to the bill.

The costs of the other parties, *Francis* is ordered to pay; his default in paying his own debt having occasioned the whole litigation. But should he make default, and the sale not produce enough to pay *Sage* what he is entitled to receive, with costs, the plaintiff must make good the difference to the extent of *Sage's* costs up to decree.

The Master may make *Henry Johnstone* a party in his office, but any direction in the decree to this effect is unnecessary.

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(a) Vide 1 Seton's Forms, p. 42b, 3rd ed.

1867.

EWART V. GORDON.

*Executors and Trustees—Security on assets of estate—Public securities.*

Where advances were made by way of loan to the managing executor of an estate, as such, and subsequently security was taken therefor from him on part of the assets of the estate, such advances being made and security taken in good faith on the part of the lender, and it appeared that some of the advances were duly entered in the books of the estate, and the name of the lender (who had no other transactions with the estate) appeared as a creditor in several annual balance sheets sent to the other executors by their agent, and no objection on their part was ever made; the court refused, at the instance of such executors, to order the securities to be delivered back to them, without payment of such advances.

Where a testator authorizes his executors to invest the surplus of his estate in public securities: *Held*, that municipal debentures were not thereby authorized.

Where the same persons are executors and trustees under a will, they do not lose their powers as such executors and become mere trustees, when all the testator's known debts are paid, or by mere lapse of time.

**Statement.** This case was heard before Vice-Chancellor *Mowat*, at Hamilton, on the 14th of November, 1866.

Mr. *Crooks*, Q. C., and Mr. *Blake*, Q. C., for the plaintiffs, referred to *Strow v. Ansley* (a), *Bridgman v. Gilt* (b), *Blain v. Bromley* (c), *Webb v. Ledson* (d), *Cornell v. Gladstone* (e), *Eager v. Barnes* (f), *Ingle v. Partridge* (g), *Roaf v. Gregory* (h), *Allan v. Scott* (i), *Lord Shipbrooke v. Lord Hinchinbrook* (j), *Tanner v. Carter* (k), *Ashly v. Ashly* (l), *Lewin on Trusts*, 429, 457, 451.

Mr. *Strong*, Q. C., Mr. *Burton*, Q. C., and Mr. *E. Martin*, for defendant, referred to *McLeod v.*

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(a) 1 D. M. & T. 635

(c) 5 Hare 542.

(e) 27 Beav. 568.

(g) 32 Beav. 661.

(i) 12 L. T. N. S. 449.

(k) 1 Ph. 717.

(b) 24 Beav. 303.

(d) 1 K. & J. 385.

(f) 31 Beav. 579.

(h) 11 Jur. N. S. 98.

(j) 16 Ves. 479.

(l) 7 B. & C. 468.

*Drummond (a), Russell v. Plaice (b), Miles v. Dunford (c), Forbes v. Peacock (d), Keen v. Roberts (e), Tinkler v. Hindmarsh (f), Armour v. Harris (g).* 1867.

*Ewart  
v.  
Gordon.*

MOWAT, V.C.—The plaintiffs in this suit are the surviving executors and executrix named in the will of the late *James B. Ewart*, Esq., of Dundas; and the suit has arisen out of the unexpected insolvency of *James McIntyre*, deceased, who was the managing executor of the estate. The testator died on the 17th December, 1853, leaving a very large estate, real and personal, estimated as worth £55,000. He was carrying on at the time of his death an extensive business: he owned several mills; was largely engaged in the manufacture of flour; and was partner also in an iron foundry. Between the years 1859 and 1864, inclusive, the defendant, Captain *Gordon*, advanced and paid to *McIntyre*, and to the agent of the executors, *Josiah M. Babington*, respectively, by way of loan to the estate, several sums of money, small in amount as compared with the value of the testator's estate, though bearing no doubt a very different relation to the means of the defendant. On the 16th of November, 1864, certain municipal debentures belonging to the estate were on the application of the defendant and by direction of *McIntyre*, delivered by *Babington* to the defendant as collateral security for the balance then due, or considered to be due, by the estate, in respect of the moneys paid as well to *McIntyre* as to *Babington*, the same with interest to 5th December, 1864, amounting to \$4100; and it was mutually agreed that the defendant should receive three months' notice before being required to accept payment, and should give three months' notice before demanding payment. There was no suspicion at this time, nor, so far as appears, for

Judgment

(a) 17 Ves. 717.

(b) 18 Jur. 254.

(c) 2 Sim. N.S. 234; S.C. 2 D.M. & G. 641.

(d) 1 Ph. 717.

(e) 4 Madd. 332.

(f) 2 Beav. 348.

(g) 1 Russ. 155.

1867. twelve months afterwards, of *McIntyre's* insolvency, or of his misapplication of any of the money of the estate; but on the 13th of April, 1866, he made an assignment for the benefit of his creditors, and on the 8th of August following he died insolvent.

Ewart  
v.  
Gordon.

So much of the sum secured by the debentures as consisted of the advances to *McIntyre*, and interest thereon, the plaintiffs now repudiate; and the bills prays that the transfer of the debentures to the defendant may be declared a breach of trust, and that the debentures may be delivered up to the plaintiffs.

Two of the plaintiffs, *John Ewart* and *David Ewart*, have always resided in England, and have not proved the will, but have, the bill says, acted under its trusts, and accepted the execution thereof. The other plaintiffs, *Mr. Crooks* and the testator's widow, together with *Mr. McIntyre*, proved the will. *Mrs. Ewart* went to England in 1855, or earlier, with her children; and has remained in England ever since. *Mr. McIntyre* had formerly been a clerk of the testator's, and he had the unlimited confidence of the plaintiffs until late in 1865. His standing in the community was very high, and the plaintiffs, in common with the public generally, had every faith in his integrity, and judgment, and financial position. His services to the estate were great and valuable, and were regarded by the plaintiffs with the warmest gratitude; and it is manifest, that no suspicion of unfaithfulness to his duty entered their minds until it was forced upon them some time after all the transactions with the defendant had taken place.

Judgment.

As to the money received from the defendant, it is not denied that it was to the estate, and on the credit of the estate, that he considered he was lending his money; that it was received from him as for the estate; that in advancing the money, and subsequently receiving the debentures in security, he was acting in entire good faith

and without any notice or suspicion of any misapplication or intended misapplication of the money by *McIntyre*. 1867.

Ewart  
v.  
Gordon.

On the other hand, there was on the part of *Babington*, or indeed of *McIntire*, no secrecy in regard to these moneys. All *Babington's* receipts were duly entered from time to time in the cash book of the estate, and thence posted to the defendant's credit in the estate ledger. The same was the case in substance with *McIntyre's* receipts up to and inclusive of the year 1861. Mr. *Crooks* was in the habit of visiting Dundas occasionally, where Mr. *Babington's* office was, and of looking over the books, and might have seen these entries; but if he did, he made no objection to the transaction until November, 1865; and then his objections were not communicated, nor directed to be communicated, to the defendants: and the defendant knew nothing of them before the 20th of June, 1866. A copy of the annual balance sheet of the various accounts in the ledger was regularly transmitted by *Babington* to each of the plaintiffs, up to January, 1862. This balance sheet shewed the sums due to the defendant at the end of 1859, 1860, and 1861, respectively; and no objection was made thereto by any of the plaintiffs. After 1861, *McIntyre* did not, as theretofore, report his transactions to *Babington*; and they were not entered in the estate books; but he continued to receive and disburse large sums of money for the estate; and I have no doubt his doing so was with the general knowledge and approbation of all the plaintiffs. It is alleged that the money received from the defendant was duly applied; and that it was after most of it had been received, that *McIntyre* collected the money which constitutes the balance of \$13,000 or thereabouts, which his assignees admit to be due by him to the testator's estate; but it is contended on behalf of the defendant, that he should not be put to the proof of this, his advances having confessedly been made *bona fide*, and he having been no party to the subsequent application of them. Judgment.

1867.

Ewart.  
v.  
Gordon.

If the money was misapplied, it is certainly hard that the defendant should be responsible. If the plaintiffs had repudiated these transactions in 1859, when they commenced; or in any year afterwards until 1865; and had given the defendant notice of such repudiation, he probably would have been able to save himself from loss. Either the transactions were with their sanction, or were proceeded with in consequence of their own confidence in their co-executor, and their consequent omission to examine his accounts and notify the defendant that the transactions were not authorized by them; and in either case it would be hard and inequitable that they should now be at liberty to transfer to the defendant the unexpected loss of which they themselves have really been the occasion (*a*). As between themselves and *McIntyre* or *Babington*, the entries in their books may not effect them. But it is difficult to see how, as between themselves and third persons dealing *bona fide*, the plaintiffs can plead ignorance of what their agent knew all along, and ignorance for years of entries made by such agent in their own books from time to time as the transactions occurred.

Judgment.

But the plaintiffs were no parties to the delivery of the debentures to the defendant: Can they repudiate the delivery on that ground?

It is quite clear that, if money is lent to an executor as such, without security, the lender can only claim against the estate so much of it as the estate got the benefit of; but that if at the same time as the executor receives the money, he pledges for it assets of the estate, the transaction being free from fraud or bad faith on the part of the lender, he can hold the pledge, whatever the executor does with the money (*a*). But how is it if the money is advanced without any security at the time, but assets of the estate are subsequently pledged for its repayment.

(*a*) *McLeod v. Drummond*, 17 Ves. 171; *Russell v. Plaice*, 18 Beav. 21

On that point I am not aware of any case before *Miles v. Dunford* (which was decided in 1852) (a). In that case Vice-Chancellor *Kindersley* held, that such a mortgage was invalid (b), and that all the relief the lender could claim was a reference to the Master to inquire whether any and what sums out of the loan were applied in the administration of the testator's estate. His Honor was of opinion, however, that the suit was not properly constituted, and on that ground dismissed the bill. On appeal (b) the Lord Justices (Lord *Cranworth* and Sir *James L. Knight Bruce*) differed from the Vice-Chancellor on both points, being of opinion that the bill was properly framed, but should be dismissed upon the merits. Their Lordships were evidently of opinion that if the loan was made, and the mortgage subsequently given, in good faith on the part of the lender, the transaction was valid ; an opinion which appears to me to entirely accord with the principle of previous decisions (c). The Lord Justice *Knight Bruce* observed, "On the evidence the security is not in any manner impeached. Assuming that all the evidence that can be, has been adduced, the question is, whether this creates such a case of suspicion as that further inquiry should be directed or allowed. I am of opinion that that proposition cannot be maintained. The only evidence is, that the advances were originally made without security, and that the security was afterwards added. That is a circumstance demanding attention, but it does not go further. It is not inconsistent with probability that the advances were made for a purpose for which the executor might properly borrow as executor. I think that the presumption is in favor of the propriety of the transaction, and that the plaintiff wholly fails." In this judgment the Lord Justice *Cranworth* concurred.

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Ewart  
v.  
Gordon

Judgment.

(a) 2 Sim N. S., 234

(b) S. C. 2 D. M. & G. 641.

(c) Vide *McLeod v. Drummond*, 14 Ves. 253 ; *Ib.* on appeal, 17 Ves. 152 ; *Keene v. Roberts*, 4 Madd. 333.

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Ewart  
v.  
Gordon.

The case of *Collinson v. Lister (a)* was not cited at the bar, but contains observations by the Master of the Rolls, and by Lord Justice *Turner* on appeal, which it has been necessary for me to consider. No reference seems to have been made in either of the arguments or judgments to *Miles v. Dunford*, and, without stopping to remark in detail on the observations referred to, I shall merely say that I think the case cannot be treated as shaking the authority of the prior decision of the Court of Appeal.

Judgment.

Apart from authority, I should say that if it is safe, proper, and desirable for the law to allow an executor to mortgage his testator's assets as a security for a contemporaneous advance, it is not easy to shew that it is unsafe, improper, and undesirable to allow him to execute a valid mortgage for an antecedent advance made to him as executor, where the advance was made and the mortgage taken in good faith, and without any notice or suspicion of an intended or actual misapplication of the money by the executor. Such a power would not be extending an executor's authority to bind the estate beyond the assets in his hands, and might secure forbearance when forbearance may be as important to the estate as an original advance on the same security.

It is contended, however, that the debentures in question were held by the executors, not as executors, but as mere trustees. The object of this contention is, to obtain the advantage of the rule, that all trustees must concur in every act to render it binding on the estate; instead of each executor being authorized to act alone, there being no proof that the delivery of the debentures had the sanction of all.

In what capacity then were these debentures held by the executors ?

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(a) 20 B. 371, S. C. 7 DeG. McN. & G. 634.

I am clear they were held by them as executors. It is said that all the known debts of the testator had been paid before the defendant's advances were made, and years before the debentures were delivered to the defendant; and that these circumstances are sufficient to create a change in the character in which executors held the assests of an estate. But the rule is not so. Indeed, it is found by experience that unexpected liabilities spring up many years after all known debts have been paid (a); and the doctrine is, that some act by the executors is necessary to divest them of their authority as executors, and to make them mere trustees of assets which have come to their hands as executors. Even proof of an appropriation intended for that purpose may not be sufficient. Thus in *Willmott v. Jenkins* (b), a testator had bequeathed to his executor and executrix the sum of £300 upon trust to invest the same in the funds, and during the minority of the plaintiff to apply to dividends towards her maintenance and education, and on her attaining twenty-one or marrying, then to transfer the funds to her. The surviving executor paid the testator's debts, invested £300 of the residue as directed, and paid the dividends for the plaintiff's maintenance, but executed no declaration of trust: and the Master of the Rolls held that "there was an intention to appropriate, but that such intention was not carried into effect."

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v.  
Gordon.

Judgment

That case shews that if these debentures had been a species of investment authorised by the will, the purchase would not necessarily have destroyed the powers over them of the executors as such. But the only investments which the will authorises are in "the public securities or chartered banks of this province, or public securities in England or Scotland, in the names of" the executors; and municipal debentures are not "public securities," within the meaning of this provision. I am

(a) Vide *Forbes v. Peacock*, 1 Ph. 717; *Wrigley v. Sykes*, 21 B. 345, *Labin v. Heape*, 27 B. 553.

(b) 1 Beav. 405.

1867. clear that the expression "public securities" must be construed as meaning government securities (a).

Ewart  
v.  
Gordon.

Judgment.

It does not appear either, when, or how, or for what, the executors became possessed of these debentures. All the evidence is the following general statement of Mr. *Babington*: "The surplus of [the testator's] estate was invested in mortgages and debentures. The debentures in question were part of such investment." It does not even appear that all the plaintiffs were aware of the "investment," or sanctioned and adopted it, before the debentures were delivered to the defendant. Further, the will does not contemplate any period when the executors were to lose their character as such, and become mere trustees; and but for the loss which the estate is likely to suffer from the misconduct and insolvency of *McIntyre*, I am satisfied from the evidence, that no such change would have been desired or thought of by the plaintiffs. Some of the executors or trustees were always resident in England, and the assets, however invested, were, so far as appears, in this country. If the concurrence of all were necessary in every receipt or investment of money, and the executors were so advised, much embarrassment and inconvenience would have occurred, which I have no doubt, from the correspondence and conduct of them all, would have been deemed by them entirely useless, and to be by all means avoided. If the evil had to be encountered, and if they were advised that it could be diminished by a power of attorney from the executors or trustees in England, I have no doubt that power would have been given, not to *Babington*, but to the Canadian executors, Mr. *Crooks* and Mr. *McIntyre*, both of whom had the full confidence of their co-executors.

In a word, I have no doubt that, as a matter of law, the obtaining of these debentures did not render the

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(a) Vide *Ellis v. Eden*, 23 B. 549.

executors trustees of them as distinguished from executors; and that, as a matter of fact, it was not intended to do so by such (if any) of the plaintiffs as were privy to the transaction.

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Ewart  
v.  
Gordon.

I may add, that, if the debentures were held by the plaintiffs and *McIntyre*, not as executors, but as mere trustees, I think the circumstances relied on to fix the defendant with notice of the fact, are insufficient for that purpose.

It was further contended, that a pledge by one of several executors was void; that to render it availing all must concur. No authority was cited for this proposition, and I understand the rule to be the other way (a).

It was also contended, that as the executors had given power to *Babington* to act for them, this deprived them of the powers which would otherwise belong to them severally. But I see no ground of law or fact to support this argument. The mere appointment by executors of an agent to act for them in certain matters, unquestionably does not involve an abandonment of their own rights and powers in the same matters; and it is plain from the correspondence and conduct of the plaintiffs that any such change in *McIntyre's* position was the last thing the plaintiffs would have thought of, or did think of, at the time the power of attorney was executed. *Babington* acted, and was intended to act, under *McIntyre's* instructions and directions; and it was *McIntyre* and not *Babington*, who had the chief confidence of the plaintiff.

Judgment.

One sum of \$300 was handed by the defendant to *McIntyre's* partner, for the testator's estate, *McIntyre* being absent from town. On his return he adopted the

(a) See 1 Wms. Executors, pt. 2, Bk. 4, ch. 1, p. 818 et seq., 2 lb. pt. 2; Bk. 1, ch. 2 p. 851, et seq., 5th Eng. ed.; and cases there collected.

1867. payment, gave the defendant a receipt as executor, and the sum was entered to *McIntyre's* credit by his firm in the same way as any other moneys received for the estate. I think this sum stands on the same footing as the sums paid to *McIntyre* himself.

On the whole, therefore, I think that the plaintiffs have failed to make out any case for the relief prayed against the defendant, and that their bill must be dismissed with costs.

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### EWART V. DRYDEN.

#### *Assignment—Executors—Mortgage—Payments.*

Five executors and trustees took an assignment of a mortgage to two of their number, described therein as executors and trustees under the will of the testator, the assignment containing no further reference to the will; the agent for the five thereupon gave notice to the mortgagor that the assignment had been made to the executors, and it did not appear that the mortgagor had any other notice of the assignment:

*Held*, that he was justified in assuming that the assignment was made to the executors as such; and payments to one of them made *bona fide*, were held valid.

Hearing at Hamilton, 15th November, 1866, before Vice Chancellor *Mowat*.

Mr. *Crooks*, Q. C., and Mr. *Blake*, Q. C., for plaintiffs.

Mr. *Strong*, Q. C., and Mr. *Burton*, Q. C., for defendant.

In addition to the cases cited in *Ewart v. Gordon* (ante page 40), *Hope v. Liddell* (a) was referred to.

MOWAT, V. C.—This is the second of the suits arising out of the insolvency of *James McIntyre*, the acting

executor of the estate of the late *James B. Ewart*, and heard before me at Hamilton. The facts peculiar to this case, are these :

1867.

Ewart  
v.  
Dryden.

On the 11th May, 1857, the defendant, who is described as of the Township of Eramosa, yeoman, made a mortgage in favor of *John Gartshore*, on certain property therein described, to secure £500, to be paid on the 11th May, 1860, with interest meantime half yearly.

In December of the same year, this mortgage was assigned by *Gartshore* to *McIntyre* and the plaintiff *Adam Crooks*, described in the deed of assignment as "executors and devisees in trust of the late *James Bell Ewart*," the instrument not containing any further reference to the will or the trusts thereof, or to the representative character of the assignees. The defendant was not privy to this assignment. After it was agreed for, but before it was executed, *Babington*, the agent for the executors and trustees under the will, gave the defendant the following written notice in reference to the transaction :

Judgment.

" DUNDAS, 8th Dec., 1857.

" MR. ROBERT DRYDEN, Eramosa.

" DEAR SIR,—I beg to own the due receipt of your favor of the 7th inst., covering £15 currency, for six months' interest on your mortgage for £500, given to *John Gartshore*, Esquire, and which was due on the 11th of last month.

" The mortgage has been assigned to the executors of the late *James B. Ewart*, whose agent I am, and the next payment of interest, due 11th May, must therefore be remitted to me.

" I am, Dear Sir,

" Your obedient servant,

" J. M. BABINGTON."

The letter to which the writer refers, is not produced.

1867. I think it was stated to have been a letter to *Gartshore* enclosing the money therein mentioned to him, in ignorance of the assignment, or, rather, intended assignment. A receipt for the money is indorsed on the mortgage, under date 8th December, 1857, and is signed by *Babington*, thus: "The executors late *J. B. Ewart*, per *J. M. Babington*." When the next payment of interest became due, *Babington* wrote respecting it to the defendant, signing the letter in the same way, and sending an account of the amount due in the following terms:

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Dryden.

"DUNDAS, 11th May, 1858.

"MR. ROBERT DRYDEN, Eramosa.

"To the Executors of the late *J. B. Ewart*.

For 6 month's interest on his mortgage to *John Gartshore*, assigned by him to Mr. *Ewart's* executors, \$2000,  
at six per cent. for six months. \$60.

"THE EXECUTORS LATE J. B. EWART,

"Per *J. M. Babington*,"

Judgment.

*McIntyre's* letters and receipts to the defendant, treated the transaction in the same way; and the defendant does not appear to have had any notice of the assignment beyond what the letters of *Babington* and *McIntyre* gave him.

The defendant subsequently made several payments to *McIntyre* on the mortgage, naturally thinking it safer, probably, to pay to one of the principals, than to an agent. That he made these payments in entire good faith, believing that *McIntyre* was entitled to receive them, there is no doubt. *Babington*, too, admits that he was aware *McIntyre* was receiving such payments, and he never objected to his doing so: and I see no reason for supposing he thought that *McIntyre* had no right to receive them, or that the plaintiffs did not wish that he should receive them. The plaintiffs have put in evidence an account which *McIntyre's* assignees have delivered to them, and which the plaintiffs assert shews

a smaller balance against *McIntyre's* estate, than is really owing ; but this account shews that *McIntyre* was in the habit of receiving and disbursing large sums on account of the testator's estate, up to the very year of his assignment. But the plaintiffs contend that the defendant's payments were not valid ; that they should have been made to the plaintiffs jointly, or at all events to the assignees of the mortgage jointly, or to *Babington* as the duly authorized agent for all. The bill is for the foreclosure of the mortgage, and the plaintiffs ask for a declaration in the decree that the payments to *McIntyre* were not valid payments.

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v.  
Dryden.

If the assignment was really to the executors as such, I am clear that the defendant would have been quite justified in paying either of them.

Now, *Babington* being the authorized agent of the plaintiffs and *McIntyre*, and his letters having been written to the defendant in that capacity, they must be treated as the letters of his principals (a) ; and I think that the defendant was entitled, as against the plaintiffs, to assume, on receiving the letter of December, 1857, that it correctly described the assignment ; and to act on that assumption. The case of *Re Bright's* trusts (b) is precisely in point. There an assignment had been made of part of a contingent reversionary interest in a fund vested in trustees ; and the assignor covenanted to insure his life against the contingency, and to pay the premiums ; and in default he charged the same on his remaining interest in the fund. The assignee gave notice of the assignment so far as it related to the portion assigned, but no reference was made in the notice to the covenant. The assignor made subsequent mortgages of his interest in the fund ; and the question was, whether the first assignee could claim the

Judgment.

(a) Vide Taylor on Ev. ss. 539, 540, &c.

(b) 21 B. 430.

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Dryden

premiums he had paid on the policy. The Master of the Rolls held that the rule, that notice of a deed is notice of all its contents, did not apply to such a case, and that the assignee could not claim a prior charge for the premiums (a).

It was contended on behalf of the defendant, that it was not shewn by the evidence that this mortgage was held by the plaintiffs and *McIntyre*, or by Mr. *Crooks* and Mr. *McIntyre*, as trustees and not executors; that on the contrary, the circumstances in evidence shewed that it should be treated as personal estate of the testator, and as really in the hands of the executors as such; that, if not, *McIntyre* must, at all events, be regarded as authorized by the plaintiffs to receive the money; that, moreover, he appears by the produced account to have duly applied the money he received from the defendant; and that his ultimate indebtedness to the testator's estate arose from subsequent transactions; but I have not thought it necessary to consider fully these and other matters urged by the defendant, my opinion being in his favor on the point previously mentioned.

Judgment.

The decree will be the usual decree of foreclosure; with a declaration that the payments made by the defendants to *McIntyre*, or to his partner by his authority, are valid payments on the mortgage. The defendant is to be allowed, in taking the account, the costs of the suit up to the hearing, except so far as the same would have been incurred if the plaintiffs had not attempted to repudiate the payments to *McIntyre*; and the plaintiffs are to have the costs of an ordinary undefended foreclosure suit up to the decree, and the subsequent costs.

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(a) See also *Ware v. Lord Egmont* 4 De. G., McN. & G. 460.

1867.

## EWART V. SNYDER.

*Will—Devise in trust for sale.*

Devisees in trust for sale of real estate must jointly receive or unite in receipts for the purchase money, unless the will provides otherwise, and the case is not affected by the property being charged with debts, and the power of sale being to the executors *eo nomine*.

When such a mortgage was taken and the mortgagees were therein described as executors and devisees in trust, payments to one were held not to be thereby authorized.

Hearing at Hamilton, 15th of November, 1866, before Vice-Chancellor *Mowat*.

Mr. *Crooks*, Q. C., and Mr. *Blake*, Q. C., for the plaintiffs, referred to *Bridgman v. Gill* (a).

Mr. *Strong*, Q. C., and Mr. *Burton*, Q. C., for the defendant, referred to *McLeod v. Dummond* (b), *Stewart v. Norton* (c).

MOWAT, V.C.—This is a suit for the foreclosure of a mortgage, and is the third of the three cases, arising out of the insolvency of Mr. *James McIntyre*, which were heard before me at Hamilton, in November last. The plaintiffs are, as in the other suits, the surviving trustees and executors and executrix of the late *James B. Ewart*. The defendant is a debtor of the estate for the purchase money of certain land of the testator sold by the plaintiffs and *McIntyre*, under the authority of the will, which charged the testator's real and personal estate with his debts, funeral and testamentary expenses and legacies; and directed that his executors thereafter named, or the survivors or survivor of them should, and might at any time after his death, in their discretion, by public or private sale, by a good and sufficient conveyance in the law, grant, bargain,

Judgment.

(a) 24 Beav.

(b) 17 Ves. 717.

(c) L. T. N. S. 502.

1867. sell and convey all or any part of his freehold estate in the Province of Canada (excepting as therein mentioned) and upon such terms of payment as to them, or the survivors or survivor of them, should seem meet ; and that all moneys arising from the sale of all or any part of his estate, or collection of debts, or otherwise realized out of his said estate, should be invested in any of the public securities, or chartered banks of this Province, or public securities, of England or Scotland, in the names or name of his said executors or surviving executor, or other public securities, at the discretion of his said executors, so long as the same might be under their control.

*Ewart*  
v.  
*Snyder.*

Judgment.

Under these powers the plaintiffs and *McIntyre* sold and conveyed the property set forth in the bill, to *John Atkinson* and *Charles G. Tisdale*. The conveyance bears date the 15th of May, 1856 ; there is indorsed on it no receipt for the consideration. *Atkinson* and *Tisdale* executed a mortgage on the property for the purchase money, £5750, and after making several payments they transferred their interest in the property to the defendant ; the defendant was accepted by the trustees as purchaser in their stead ; the original mortgage was discharged, and a new mortgage, bearing date the 27th of March, 1860, taken from the defendant in its place. Both mortgages were made, not to all the trustees, but to those of them only who had proved the will, and they are described in both mortgages as executor and executrix, and devisees in trust of the will. Both mortgages state the consideration to be money paid by the mortgagees, and neither instrument contains any further reference to the will or the trusts thereof.

The defendant has made several payments to *McIntyre* on this mortgage, and the plaintiffs allege that these payments were not valid, and that the defendant is not entitled to credit for them on the mortgage ; but such

of them as were reported to the plaintiff's agent *Babington* before the 1st of January, 1862, the plaintiffs say the estate of the testator got the benefit of; and these therefore, though unauthorized, they do not dispute; the propriety of the subsequent payments is the question between the parties.

1867.

Ewart  
v.  
Snyder.

Now, the property sold was real estate of the testator, which was not saleable by the executors as such; and the defendant knew all the facts. Independently of the form of the mortgage, it is therefore clear that the payments should have been made to all the trustees jointly; or on their joint receipt; or to their attorney, authorized by them all to receive the money (*a*). The circumstances of the testator giving the power to sell to the executors *en omme*, and charging his estate with his debts, have never been held sufficient to vest some of a number of trustees with the power of selling, or receiving the purchase money, without the concurrence of the others. The object of the rule is to give parties the security of all against any breach of trust by one or more (*b*). If it is the will of a testator that any one or more of those he names should have authority, without the concurrence of the others, to sell his real estate, or to receive the purchase money, it is within his power to say so; but no case was cited that would justify me in holding such an intention manifested by the circumstances relied on here on the part of the defendant.

Judgment.

The learned counsel for the defendant further contended, that the circumstances of the mortgage having been made in the names of those executors and executrix who alone proved, and of their being designated therein "executors and executrix," as well as "devisees in trust," sufficiently indicates an intention on the part of the other trustees to give the mortgagees severally, in

(*a*) *Steuart v. Norton*, 3 Law J., N. S. 602.

(*b*) See the cases referred to in *Proudfoot v. Tiffany*, 11 Gr. 462.

1867. respect of the mortgage, all the powers of executors. Now, it was I apprehend irregular to take the mortgage to three of the trustees, though the effect should be to require the concurrence of all three in receipts of money under it; but the irregularity would be still greater if the mortgage is to be construed as contended for. I am clear that such a construction would be entirely unwarranted by authority:

Ewart  
v.  
Snyder.

Juigment.

It was further contended, that the evidence, viewed in connection with the form of the mortgage, shews that *McIntyre* had the authority of his co-trustees to receive the money; that they knew, or must be treated as if they had known, that he was receiving payments on the mortgage from the defendant, and that they acquiesced therein, and cannot now as plaintiffs repudiate such payments, whatever their *cestuis que trust* might be able to do; and that, at all events, the estate has had the benefit of the payments of the defendant after 1861, as well as of the prior payments, and should therefore give credit for them. I think the evidence bearing on these points either way, is not as full as, on a reference to the Master, it may probably be made, and I shall therefore make no declaration, and express no opinion, on them now. The Master, without any special direction, will have full power under the General Orders to take such evidence, and to act upon it according to the view of it he may take: the decree will therefore be in the usual form of decrees for foreclosure.

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## BANK OF ELGIN V. HUTCHINSON.

1867.

*Judgment Creditor—Sale.*

A judgment creditor had attached a debt due to the defendant, as a security for which land had been conveyed to the defendant, and a suit for redemption was pending. The bill in that suit was afterwards dismissed for default in paying the money is pur-  
suance of the report therein :

*Held*, that, the property having thereby in effect become substituted for the debt, the creditor was entitled to a sale thereof in this court, and payment of the proceeds towards satisfaction of the judgment.

This cause was heard at Toronto, 19th September, 1866, when it was ordered to stand over, with liberty to the defendant *Snider* to file a supplemental answer. A supplemental answer was accordingly filed, and the cause came on again for hearing, at Hamilton, on the 19th November, 1866, when further evidence was given on both sides.

Statement.

Both hearings were before Vice-Chancellor *Mowat*.

The judgment below was pronounced after the second hearing.

Mr. *Hodgins*, for plaintiffs.

Mr. *Roaf*, Q. C., for defendants.

MOWAT, V. C.—The plaintiffs, the Bank of Elgin, are judgment creditors of *Mark Hutchinson*. In July, 1864, they took the necessary proceedings for attaching a debt due by *Matthew Hutchinson* to their debtor *Mark*, secured on real property under conveyances bearing date prior to the 9th September 1857. On that day a bill to redeem was filed by *Matthew* against *Mark*, and a decree for redemption was made by consent on the 25th November, 1857. No report was made by the Master until 1864. In this interval *Mark* had conveyed part of the property to

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Hutchinson.

1867. the defendant *Jacob Snider*. This was on the 11th October, 1859. On the 12th June, 1864, the Master made his report, appointing the mortgage money to be paid to *Mark* on the 21st December, 1864. In July, 1864, the Bank took the necessary proceedings for attaching this debt, and duly served the attaching orders on *Matthew* upon the 15th of that month. On the 19th *Mark* conveyed to the defendant *Rachel Snider*, wife of *Jacob Snider*, the whole property, and the debt secured thereon. On the 17th October, 1864, *Jacob Snider* conveyed to his wife all his interest in the same property under the deed of the 11th October, 1859. On the 22nd October, 1864, *Rachael Snider*, being the apparent assignee of all *Mark's* interest in the property and debt, took the necessary proceedings for making herself a party to the redemption suit between *Matthew* and *Mark*; and, the money not being paid at the time appointed by the Master's report, an order was granted on the 23rd December, 1864, dismissing the bill with costs: thus putting an end to *Matthew's* right to redeem.

Judgment

The plaintiffs allege that the deed from to *Mark* to *Jacob Snider* in 1859, and the deeds to *Rachael Snider* in 1864, were fraudulent and void against them.

It is clear that the deeds to *Rachael Snider* cannot be sustained as against the plaintiffs; but the conclusion to which I have come as to the deed to *Jacob Snider* in 1859, is, that it was not void. It is impeached as made by *Mark* when in insolvent circumstances; and with intent to give *Jacob Snider* a preference as against *Mark's* other creditors including the plaintiffs. I think that *Mark* was insolvent at the time, but had not abandoned the hope of retrieving himself, and did not make the deed to *Jacob Snider* with intent to defeat or delay his other creditors, or to give *Snider* a preference over them within the meaning of the Statute. The deed is

absolute in form; and I think the fair inference 1867.  
 from all the evidence which has been given is, that  
 the deed was either intended to be what it purports,  
 or was given to secure *Snider's* past and future indorse-  
 ments for the grantor's accommodation. *Snider* ap-  
 pears to have been an indorser for *Mark* at the time, to  
 a large amount, and to have paid money and indorsed  
 for him to a still larger amount subsequently—to an  
 amount, in fact, exceeding the value of the property in  
 question; and there are other circumstances indicating  
 the good faith of the transaction on the part of *Snider*.

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 v.  
 Hutchinson.

The learned counsel for the defendants addressed to  
 me an ingenious argument to show that, as a matter of  
 law, by means of the conveyance of part of the property,  
 in the state of *Mark's* interest in it at the time, *Snider*  
 was entitled to claim the whole property. But I  
 am clear that this position is unsustainable. *Snider* was  
 purchaser or mortgagee of part, subject to *Matthew's*  
 equity of redemption; and, *Matthew's* equity having  
 since been put an end to, *Snider*, or his wife as repre-  
 senting him under the deed he has executed in her  
 favor, is now purchaser or mortgagee, of the same part,  
 free from *Matthew's* right to redeem.

Judgment

It is stated in the answer that it was by mistake that  
 part only of the property conveyed by *Matthew* was  
 included in the deed to *Snider*, but of this there is no  
 evidence whatever.

It was contended that there was no debt due by  
*Matthew* that could be attached by the Bank. But I  
 think this cannot be held. Part of the debt, in fact, was  
 secured by two mortgages, containing, I presume, cove-  
 nants for payment. *Matthew*, after executing these  
 mortgages, gave *Mark* an absolute deed of the property;  
 but his bill alleged that there was no sale, and no intention  
 to make an absolute transfer, and claimed that *Mark*  
 held the property as security merely for his advances.

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v.  
Hutchinson.

1867. The decree (which was by consent,) proceeded on that footing, and referred it to the Master to take an account of what was due from *Matthew* to *Mark* in respect of the transactions between them. Thus the decree, by consent, treats the claim as a debt; and if it was a debt at all, it was a legal and not merely an equitable debt, being for moneys advanced by *Mark* to *Matthew*.

It was said that as to part of the debt, *Matthew* might have set up the Statute of Limitations. But if he could, he did not do so; and the debt has now in effect been paid, so far as *Matthew* is concerned, by an absolute title to the property which was held in security for it having been substituted for the debt.

Judgment.

The Bank, by the attaching order, did not accept the debt of *Matthew* in satisfaction of so much of their judgment. Their interest was rather that of a mortgagee of the debt. By payment of their judgment their right to receive the debt would be lost. The proper relief, therefore, is a sale of that part of the property which was not comprised in the deed of the 11th October, 1859; the property having, by the proceedings in the redemption suit, become substituted for the debt which the Bank had attached. Out of the proceeds, the plaintiffs will be entitled to receive their debt and the costs of this suit, including the costs of both hearings. The main contention in the suit having been as to the deed of 11th October, 1859, and the plaintiffs being unsuccessful as to that deed, I cannot give them a personal decree against the defendants for the costs; but neither is the case one for charging them with any costs in favor of the defendants.

There will be a reference to the Master for the sale, and for taking the account and taxing the costs. If there is a surplus, the defendant *Rachel Snider* is entitled to it as between the parties to this suit. As I apprehend, however, that the property is not equal to

the Bank debt and interest and costs, the defendants, to save expense, may perhaps consent to an absolute decree, vesting the property in the plaintiffs. 1867.

As *Jacob Snider's* indorsements for *Mark Hutchinson*, and the sums he has paid thereon, evidently exceed the value of the property comprised in the deed to him, it is unnecessary to consider whether the Bank would be entitled to any surplus if a surplus were expected.

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### LINDSAY V. THE BANK OF MONTREAL.

#### *Evidence—Practice.*

A husband is not a competent witness for his wife in a suit respecting her separate estate, though he may have no interest therein.

Where at the hearing the competency of a witness was objected to, and the court received the evidence subject to the objection, but afterwards held the witness incompetent, a reference was directed as to the material points to which his evidence applied, and further directions were reserved.

Hearing at Cobourg, at the sittings in November, 1866.

Mr. *Blake*, Q. C., for plaintiffs.

Mr. *Roaf*, Q. C., for the defendants *The Bank of Montreal*.

The bill was *pro confesso* as against the other defendants *Edward Payne*, *William Burnett*, and *John Sinclair Wallace*. Statement.

MOWAT, V. C.—The plaintiff, Mrs. *Payne*, wife of the defendant *Edward Payne* was beneficial owner to her separate use of certain chattels, constituting the plant used in the manufacture of spirits and other liquors, the same being vested in trustees for her, of whom the plaintiff *Lindsay* is the survivor.

1867. On the 1st of April, 1861, by an indenture of that date, made between *Edward Payne*, the husband, and the defendant *John S. Wallace*, with the apparent concurrence of the plaintiffs, the chattels were leased to *Wallace* for three years from the 1st of May, 1861, *Wallace* covenanting that he would pay for the use thereof to the trustees of the wife of the said *Edward Payne*, whose property they were thereby stated to be, at the rate of £60 a year, payable quarterly, and would insure and keep insured the said plant against damage by fire, (and keep the said plant in good working order for the benefit of the said trustees,) in some good office for the sum of £1000, and would pay all premiums of insurance thereon.

Judgment. The bill alleges that *Wallace* did insure the plant for £1000 ; that a great part thereof was afterwards destroyed by fire ; that *Wallace* received the insurance money, and therewith replaced the chattels so destroyed ; and that the chattels so replaced were afterwards used under the agreement, and were trade fixtures. The only evidence of these particulars is that of *Edward Payne*.

On the 15th of May, 1863, *Wallace* mortgaged his distillery and other real property to the *Montreal Bank* ; and the Bank claims under this mortgage to be entitled to whatever machinery, plant, goods and chattels, used in the business of brewing and distilling, were in and upon the premises at the date of their mortgage, alleging that the Bank had no notice, at or before taking the mortgage, that there was any adverse claim to these particulars ; and is in the position of purchaser thereof for value without notice.

The bill prays, amongst other things, that it may be declared that the said chattels are trust property, and are the property of the plaintiff *Charles Lindsay*, as trustee for the separate use of the plaintiff Mrs. *Payne* ;

that the chattels replaced stand in the same position as the others; and that all the said chattels should be delivered up to the trustee *Lindsay*. 1867.

*Lindsay*  
v.  
The Bank of  
Montreal.

I received the evidence of *Payne*, the husband, subject to the objection taken on the part of the Bank to his competency; but I am clear, upon consideration, that the objection must be sustained. Before the late changes in the law of evidence, it was held that a husband was not a competent witness in Chancery for or against his wife, in a suit respecting her separate estate. In *Langley v. Fisher (a)*, being such a case, the Master of the Rolls said, "I apprehend that the general rule is subject to no doubt, and that a husband and wife cannot be examined for or against each other. It is not founded on interest but on public policy."

The Provincial Statute passed in 1853 (*b*), while removing the objection to the competency of any witness on the ground of interest, expressly provided (*c*) that the act should not render competent any party to any suit, or the husband or wife of any such party. Judgment,

In the absence of *Payne's* evidence, the case is not ripe for decision on all points, as between the plaintiffs and the Bank; but as to these the plaintiffs should have an opportunity of giving other evidence if they wish; and I think it will probably be for the advantage of both parties, that this should be done by a reference to the Master, and the delay and expense of a supplementary hearing avoided.

I think the Bank, through their agent *Morgan*, had notice of the lease before they took their mortgage, and the decree will contain a declaration to that effect. It may also contain a declaration as against the other

(a) 5 Beav. 446.

(b) U. C. Consol, ch. 35, sec 4.

(c) Sec. 5.

1867. defendants to the effect prayed, the bill having been taken *pro confesso* against them.

Lindsay  
v.  
The Bank of  
Montreal.

Reference to the Master at Cobourg, to inquire what has become of the chattels leased to *Wallace*—which of them, if any, are now in existence, and in whose possession or power; whether the chattels so leased were insured by *Wallace*, and when, and for how much; whether any, and which of them, were afterwards destroyed or injured by fire; whether *Wallace* received the insurance money; and whether he replaced the chattels by other like chattels, and what has become of these; with liberty to state special circumstances at the instances of either party. I believe the points I have thus suggested for inquiry will embrace all matters of fact which now are really in dispute between the parties.

Judgment.

Further directions and costs will be reserved.

The property is said to have been purchased *pendente lite*, under a decree of this Court in another suit. The Master may make the purchaser a party under the general orders of the Court (a); but no direction as to this is required in the decree.

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(a) G. O. No. 42, sec. 15, (June 1853.)

1867.

## BLAIKIE V. STAPLES.

Blaikie  
v.  
Staples.

*Township Council—Remuneration—Decree to restore over payments.*

In 1854, a Township Council passed a by-law for remunerating the councillors for their attendance at the council, at the rate of \$20 a year. In 1859, and thenceforward, by-laws were passed providing for the further sum of \$10 a year for each councillor for letting and inspecting the roads, in addition to the \$20. The by-law passed in 1866, was moved against and quashed by the Court of Queen's Bench, as illegal. On a bill by a rate-payer, filed in the same year, the court ordered the members who were defendants, to repay to the corporation the \$10 a year they had respectively received ; but held, that the rate-payers were not entitled to a decree restoring the sums actually paid for the years between 1859 and 1865, except to the extent that such payments exceeded the statutory limit.

Hearing at Cobourg, at the sittings there, 29th November, 1866.

Mr. *Hector Cameron*, for plaintiff, referred to *Blaikie v. The Corporation of Hamilton* (a).

Mr. *Blake*, Q. C., for the defendants, cited *Carroll v. Perth* (b).

MOWAT, V.C.—The plaintiff sues on behalf of himself, Judgment. and all other rate-payers of the Township of Hamilton, except the defendants. The defendants are four members of past councils of the township, two of whom are members also of the council for 1866, and were in office when the bill was filed and the cause heard. The corporation of the township is also a defendant.

The bill alleges that the plaintiff is a resident of the township, and a rate-payer therein, and has been such since 1859, inclusive ; that the four defendants named have illegally appropriated to their own use, money of the corporation for their attendance, and expenses in attending, at the meetings of the township council, and in

(a) 25 U.C.Q.B., 469.

(b) 10 Gr. 64.

1867. inspecting and letting road jobs in the township, during the years in which they have respectively been members of the council, at the rate of \$30 each for every year; and the prayer is that an account may be taken of all money so improperly and illegally received by the four defendants, and that such defendants may be ordered to refund the same to the corporation.

Blaikie  
v.  
Staples.

Judgment.

The defendants set up that in 1854, a by-law was passed by the township council providing for the payment of £5 to every councillor for attendance at the council for each and every year thereafter; and that from 1860 up to the present year, inclusive, by-laws or resolutions were annually passed, providing, each, for paying to the councillors of the previous year, \$20 for attendance at the council, and \$10 for their services in letting and inspecting road jobs; that each of the four defendants, accordingly has received \$30 for every year he has been in the council; and that until 1866 no application was made to set aside any of these by-laws or resolutions. An application was made against the by-law passed in 1866, and was made successfully, the Court of Queen's Bench holding that the by-law "should shew upon its face that it is within the statutory power. Here [the Court observed] it does not appear that the money directed to be paid is for the attendance of the members in council, nor, if so, at what rate; and as to the \$10, it is clearly intended as a remuneration not authorized." All the previous by-laws and resolutions referred to, except the by-law of 1854, are open to the same objections.

The first contention is, that, as long as these by-laws and resolutions stand, they constitute a good defence in respect of all the money received under them. But I find nothing in the statute to support this argument. I understand the rule to be that an illegal by-law is no justification at law or in Chancery, for acts done under

it, though it has not been quashed. There is nothing in *Carroll v. Perth* (a) against this view. 1867.

Blaikie  
v.  
Staples.

It was next contended, that the plaintiff and the other rate-payers have, by not commencing proceedings before, deprived themselves of the right of objecting to the receipt of this money by the defendants. I think there is no authority that would sanction my adopting this view to the full extent to which it was pressed. Mere delay is ordinarily no bar until the statutory periods of limitations are reached; and where laches short of these periods constitutes a defence, it has been held not to have the same force against a class of persons as against an individual (b). But to a certain extent, as I shall mention presently, I think the argument a legitimate one.

It was said that any account should be confined to a period of six years before the filing of the bill. But as between trustees and *cestuis que trust*, which is the relation which the defendants bear to the corporation (c), six years do not constitute the limit of the trustee's liability. Judgment.

It was further contended, that the suit should have been in the name of the corporation, the plaintiff not having shewn that the council had refused to allow the name of the corporation to be used as plaintiff. But the modern authorities are against this view with respect to a case like the present (d).

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(a) 10 Gr. 64.

(b) See cases collected Lewin Tr. p. 569, 4th ed.

(c) *City of Toronto v. Bowes*, 4 Gr. 489; 6 Gr. 1, S. C. on Appeal.

(d) *Hodgkinson v. The National Live Stock Ins. Co.* 26 Beav. 478; S. C. on Appeal 4 DeG. & J. 422; *Hare v. The London & N. W. Ry. Co.* 2 J. & H. 94; *Burt v. The British National Life Ass. Association*, 4 DeG & J. 173; *Beman v. Bufford*, 7 Ry. Ca. 74; *Simpson v. Denison*, ib. 403; *Fooks v. The S. W. Ry. Co.* 1 Sm. & Giff 142.

1867.

Blaikie  
v.  
Staples.

The by-law of 1854 seems to have been valid when passed, the Statute then in force (*a*) not having limited the rate of remuneration to so much per diem ; nor was its invalidity asserted at the bar. This by-law does not appear to have been repealed, but would not justify the making of a larger payment than the subsequent statutes limited. It is said, and I dare say correctly, that a rate of \$1.50 per diem (*b*) would come to about \$20 a year ; and, if so, the objection of the plaintiff to the payment would be founded on matter of form rather than of substance ; and to an objection of form this Court would yield unwillingly, after the lapse of time which has occurred here during which this mode of calculation does not appear to have been objected to on the part of the rate-payers.

Judgment.

The decree must order the defendants to re-pay the remaining \$10 a year which they have received for letting and superintending the roads, this being a charge for which there seems no pretence of authority ; and to pay the plaintiff's costs ; but I think that, having reference to the delay and all the circumstances, I ought not to interfere with the payments made for attendance at council during the years preceding 1866, except to the extent that these payments may have exceeded the statutory allowance. If the plaintiff desires, he may have a reference to compute the exact amount ; but should the result not vary much on the whole, the court may probably charge him with the costs of the reference ; otherwise a reference will be unnecessary, and the following will, I believe, be the sums the defendants are to repay :—*Staples*, \$60 ; *Benson* \$70 ; *Bourne*, \$20 ; and *McIntosh*, \$20. The order for costs must be against all four jointly.

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(*a*) 13 & 14 V. ch. 181, sec. 9, sub. sec. 14.

(*b*) U. C. Consol, ch. 54; sec. 269.

1867.

## CRAWFORD V. CALCUTT.

Crawford  
v.  
Calcutt.

*Will—Construction—Wife's separate estate.*

Where a testator gave certain estates to trustees, in trust as to the income for the separate use of his daughter and her children for her life, with directions to pay the same to her, and in trust as to the capital after her death, to divide the same equally amongst her children. *Held*, that she was entitled during her life, for her separate use, to an equal share with each of her children : that the residue of the income was to be paid to her for their benefit ; and that her own individual share was alone liable to her debts.

This cause came on for hearing before Vice-Chancellor *Mowat*, at Cobourg, in November, 1866.

Mr. *Blake*, Q. C., for the plaintiff.

Mr. *Strong*, Q. C., for defendant Mrs. *Calcutt*.

Mr. *Armour*, for defendant *Austin B. Calcutt*.

MOWAT, V. C.—The object of this suit is to obtain payment of a promissory note made by the defendants, *William S. K. Calcutt* and *Mary* his wife, out of the separate estate of the wife. Judgment.

The note is for \$132, bears date of the 4th of April, 1861, and is at three months. The original date was contracted by the husband alone, and on the 17th of August, 1859, was represented by a note for \$72, at three months, to which Mrs. *Calcutt* was not a party. This note was afterwards renewed from time to time ; and the existing note of \$132 is for the original debt and the sums charged from time to time during the twenty months for interest. To several of these renewals, including the last, Mrs. *Calcutt* was a party.

The only separate estate which Mrs. *Calcutt* appears to have, is an interest to which she is entitled under the will of her father, *Thomas Eyre*, Esq., deceased. By this will one-eighth of the testator's real and personal

1867. estate is given to his executors, *Andrew Jeffery*, since deceased, and *Austin B. Carpenter*, a defendant to the bill, on the following trusts: "In trust to invest the same in their joint names as trustees for the purchase of government securities or mortgages on real estate, and to hold the capital so to be purchased, with all interest and dividends to accrue thereon, to and for and upon the several uses and trusts hereinafter mentioned; that is to say, upon trust, to pay the interest and dividends thereof, as and when the same shall be received, to, or to the sole and separate use of, my daughter *Mary Calcutt*, wife of *William Calcutt*, and her children, for and during her natural life; and I direct that the same shall not be subject to her husband's debts or control, and that her receipt alone, notwithstanding her coverture, shall be a good and sufficient discharge for the same; and from and after her decease upon trust to assign and transfer the said capital stock and all dividends, to and amongst all and every of her children." &c. The will is dated the 17th of March, 1853, and the probate bears the date the 25th of June, 1858.

Crawford  
v.  
Calcutt.

Judgment.

I think that *Mrs. Calcutt*, is entitled for her separate use during her life, to an equal share of the annual income, with each of her children, her share thus from time to time diminishing as the number of her children increases, and increasing in case of the death of any of them. The whole income is to be paid to her during her life; but the children's share of it she is to receive for their benefit. She has now five children, and her individual share will therefore, for the present, be one-sixth of the income.

Her individual proportion of the income, is by the law of this court, liable to her own debts, though not to her husband's; and, by signing the note held by the plaintiff, she has made it her own debt.

The plaintiff has recovered a judgment at law against both her and her husband by default. I think that this judgment is not binding on her, and that the plaintiff cannot recover here the costs of it.

1867.

Crawford  
v.  
Calcutt.

Without these costs, the amount due the plaintiff falls within the jurisdiction of the County Court; and I think the case is not one in which I ought to interfere with the general rule prescribed by Parliament as to the costs of such suits when brought here (*a*); and the decree must therefore be without costs up to the hearing.

It does not appear whether any income has yet become payable to Mrs. *Calcutt* under the will; and the defendant's counsel stated that there had not yet been any income; the trustee appears to be a friendly defendant. But the plaintiff may take a reference on the point if he desires it.

The decree will declare Mrs. *Calcutt* entitled for her separate use to the same share of the income during her life as each of her children; and will direct the defendant, the trustee, to pay the amount thereof over from time to time towards satisfaction of the note and interest, until the same are paid in full; with liberty to all parties to apply to a Judge in Chambers as there may be occasion. To this a reference may be added as to any income now payable, if the plaintiff desires it; reserving, in that case, further directions and the subsequent costs.

Judgment

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(*a*) U. C. Consol. Stat. ch. 15, sec. 63.

1867.

## JONES V. THE BANK OF UPPER CANADA.

*Mortgages—Deposit of title deeds—Evidence—Tax titles.*

Where mortgages are deposited as security for advances, and the mortgagor subsequently acquires the equity of redemption, the depositor's lien on the property is not confined to the amount of the mortgages.

Where a party relies on a tax sale, it is not sufficient in equity, any more than at law, to produce the Sheriff's deed. There must, amongst other things, be the proper legal evidence of the taxes having been in arrear for the necessary period; and such evidence is not dispensed with by the act of 1883 (ch. 19).

**Statement.** This cause came up for the examination of witnesses and hearing before Vice-Chancellor *Mowat*, at the sitting of the Court at Hamilton, in the autumn of 1866.

Mr. *Blake*, Q. C., and Mr. *Snelling*, for the plaintiff, cited *Exp. Tuffnell (a)*, *Carey v. Down (b)*, *Exp. Hare (c)*.

Mr. *Roaf*, Q. C., and Mr. *G. D. Boulton*, for defendants, cited *Robson v. Carpenter (d)*.

**Judgment.** *MOWAT, V. C.*—The plaintiff claims to be an equitable mortgagee by deposit with him by *William Proudfoot*, on the 4th June, 1861, of certain securities, including two mortgages theretofore executed by one *George Marcus Smith* in favor of *Proudfoot*; one, on the west half of lot No. 19, in the 8th concession of the township of Enniskillen; and the other, on the north half of lot No. 8, in the 4th concession of the same township; the mortgage on the former being the only mortgage thereon; and the mortgage on the latter being subject to a prior mortgage in favor of one *John B. Williams*, of which the defendants, the *Bank of Upper Canada*, obtained an assignment on the 26th July, 1855. Afterwards, viz., in April, 1862, *Smith* released his

(a) 4 D. & C. 29.  
(c) 11 Ves. 403.

(b) 5 Ir. Ch. 104.  
(d) 11 Gr. 298.

equity of redemption in both lots to *Proudfoot*; and on the 11th of October, 1864, the bank got a Sheriff's deed on both lots, and other land, under a sale upon an execution at their own suit against *Proudfoot*. On the 20th of November, 1865, the Sheriff executed to the Bank another deed of lot No. 8, in pursuance of a tax sale, the validity of which is disputed. On the 22nd of November, 1865, the Bank conveyed both lots, with other land, to the defendant *Joseph Price*, who is now the owner of the equity of redemption, subject to the plaintiff's interest. The bill prays for payment of the plaintiff's debt; or foreclosure or sale of the two lots.

1867.  
  
 Jones  
 Bank v. U. C.

I take all the dates which I have occasion to mention from the very badly written briefs that were left with the Deputy-Registrar, the deeds and other original papers not having been sent to me.

It was admitted at the bar that *Price* was in no better situation than the Bank, and that the defence which his answer sets up of a purchase for value without notice could not be sustained.

Judgment.

No defence is made affecting the one property, the west half lot No. 19, except that the defendants claim that the plaintiff's lien is confined in the case of both lots to the amount of the two mortgages respectively, and does not extend to the further interest afterwards acquired by *Proudfoot* under the release of 30th April, 1862. But the case of *Ex parte Tufnell (a)*, cited at the bar, is an express authority against the contention.

As to the other property, west half lot No. 8, in the 4th concession, the defendants submit two grounds of defence, (1) the purchase by the Bank under a tax sale, and (2) certain proceedings in a foreclosure suit by the bank.

1867. In proof of the tax title, the defendants produce the Sheriff's deed, and offer no other evidence, counsel contending that no other is necessary. Now, it has been frequently held at law that a party relying on a tax title must prove certain preliminary matters, one of which is that the taxes had been in arrear for the period necessary to justify a sale (a); and the statute of 1863 (b) does not dispense with proof of there being such arrears, whatever else may be the effect of that statute. The rule in equity on such a point must be the same as at law.

Jones  
v.  
Bank U. C.

Judgment.

But it was said that the form of the bill dispensed with this proof. The statement of the bill is as follows: "Thereafter the said defendants *pretended* to have purchased the said north half of lot No. 8 at a tax sale, at which the same was *pretended* to be set up for sale and sold for the payment of certain taxes *pretended* to be chargeable thereon at the date of the said sheriff's sale, and which under the said sheriff's sale [under their writ of execution against *Proudfoot*] and the conveyance to them, the said defendants were themselves bound to pay; and the said defendants have received a conveyance under the said tax sale; but such conveyance doth not and could not, under the defendants' acts of incorporation and otherwise, operate to vest in the said defendants any title prior or paramount to that of the said *William Proudfoot* or your orator; and the said land was not correctly assessed, nor was the said sale correctly advertised, nor were the said premises correctly sold, the provisions of the statute being, as they were violated in the premises; and the said defendants acquired the said lands without competition, by representing that they were the owners thereof, and wished only to correct some apparent defect in their

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(a) Vide *Doe Bell v. Reamur*, 3 U. C. O. S. 243; *Errington v. Dumble*, 8 U. C. C. P. 65; *Munro v. Gray*, 12 U. C. Q. B. 650; *Hall v. Hill*, 22 U. C. Q. B. 580.

(b) 27 Vic. ch. 19, sec. 4.

title, and by asking the audience under these circumstances not to compete for the same, and thereby the audience was induced to refrain from such competition.”

1867.

Jones

v.

Bank U. C.

It is quite manifest that these statements do not contain such admissions as dispense with any proof on the part of the defendants beyond the production of the Sheriff's deed. I must, therefore, hold that this defence has failed. There was no evidence or argument on either side as to any other of the matters set up by the bill as invalidating the Sheriff's sale.

The foreclosure suit, to which the defendants refer in their remaining defence, was commenced in October, 1858, *Williams*, the mortgagor, being the only defendant by bill, though he had previously (viz., by a deed dated 31st October, 1856, and registered 29th January 1857,) released his equity of redemption to *Proudfoot*, and had on the 11th May, 1858, executed another release of the same in trust for the bank itself, leaving in himself no apparent interest in the property. However, these matters not appearing by the bill, a decree was made on the 23rd December, 1858. Under this decree *Proudfoot* was made a party in the Master's office with many others, as incumbrancers. The Master, by his report, dated 1st June, 1859, found, amongst other things, by the affidavit of *A. D. McLean*, Esq., the agent for the solicitor of the Bank, that *Proudfoot* had, subsequently to the filing of the bill, recovered, through such agent as his attorney, two judgments against *Williams*; and that on the 11th May, 1858, *Williams* had executed the release unto *A. D. McLean*, as trustee for the Bank, for the purposes therein mentioned.

Judgment

Now, the defendants say, that on the 12th Oct. 1861, a final order was made in this suit “absolutely foreclosing all persons interested in the equity of redemption in the” land; and the order was assumed by the plaintiff's counsel on the hearing to be as thus stated;

1867. but on referring to it, I find that it does not purport to foreclose *Proudfoot*, but only certain other of the defendants. This ground of defence, therefore, also fails. What would, under all the circumstances, be the effect of such an order, if made, it is not necessary to consider.

Jones  
v.  
Bank U. C.

Declare that the plaintiff is entitled by virtue of the deposit of the mortgages, to an equitable lien or mortgage upon the hereditaments therein mentioned, for securing the moneys advanced or foreborne on the security thereof; account to be taken of what is due to plaintiff for principal and interest in respect of the same; defendants to pay the same and costs in six months; and on payment, defendants to assign the mortgages and all other securities to defendant *Price*. In default of payment, decree foreclosure and conveyance by defendants to plaintiff, or sale, at plaintiff's option: the prayer is in the alternative; and I do not recollect that it was mentioned at the hearing in which alternative, a foreclosure or a sale, the plaintiff desired the decree.

Jndgment.

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1867.

## WESTACOTT V. COCKERLINE.

## Dower—Election—Will, construction of.

A testator devised to his wife all his real and personal property during widowhood, under which she entered upon the real estate, and took and applied to her own use the personal property. Having married again, she and her husband instituted proceedings at law to recover dower in the real estate. The Court restrained the action for dower, holding that the widow was bound by the election she had already made to take under the will.

This was a suit to restrain proceedings at law for the purpose of setting out dower in favor of the defendant *Eliza Cockerline* on the ground that she had made her election to take the estate demised to her by her late husband *Stephen Westacott*, deceased. By his will the testator devised as follows: "I give and devise to my beloved wife *Eliza Westacott*, all my household furniture, and all my present stock and farm produce and implements, and also my farm, being lot No. 32, in the ninth concession of the township of Hullet, in the county of Huron, Province aforesaid, with all the buildings situated thereon, to have and to hold the same as long as she remains my widow." Subject to the payment of a small sum annually to the mother of the testator. In the event of the marriage or death of the testator's widow, he directed all the property to be sold, and the proceeds divided amongst his nephews and nieces. Statement.

Immediately after the death of the testator his widow took possession of all the estate, real and personal, and disposed of the latter, amounting to \$1400 to her own use; and she had since intermarried with the defendant *Anthony Cockerline*, and since such marriage she and her husband had continued in the receipt of the rents and profits of the real estate. The bill further alleged, that the defendants *Cockerline* and wife had commenced and were prosecuting an action at law to recover dower, which the plaintiffs submitted she was not under the circumstances entitled to claim.

1867. It appeared that the lot specified in the will was all the real estate of which the testator had been seized during the marriage. The bill prayed relief accordingly.

*Westacott*  
v.  
*Cockerline.*

Mr. *Spencer* for the plaintiffs, moved on notice for an injunction restraining the action.

Mr. *McDonald* for the infant defendants.

Mr. *Moss* for the defendants *Cockerline* and wife.

Judgment. VANKOUGHNET, C.—In this case I am of opinion that the wife was by the will put to her election, to take under it or claim her dower, and that she made her election to take under the will, and cannot now assert a right to dower; and that she should be restrained from so doing at law. The devise to her during widowhood gave her a freehold estate. Her election was made immediately after the testator's death; she could not then have both the estate and her dower in the same land. She became and was herself tenant of the freehold; and how could dower be assigned to her, she holding this estate? I think that her election once made was final, and that she could not, on losing by her own act, the estate given by the will, claim that her right to dower then arose. It existed at the death of the testator, and from that time or not at all; and so existing she abandoned it when she took under the will.

As to devises of estates during widowhood—see *Miall v. Brian* (a), *Lawrence v. Lawrence* (b), *Ellis v. Lewis* (c), *Holditch v. Holditch* (d), *Dawson v. Bell* (e), *Parker v. Sowerby* (f).

(a) 4 Mad. 119.

(c) 3 Hare, 310, and Croke, Eliz. 128.

(e) 1 Keen 761.

(b) 2 Ver. 365.

(d) 2 Y. & C.C.C. 11.

(f) 4 D. M. & G. 321.

1867.

## SMITH v. SMITH.

*Partnership—Executor.*

A testator's directions to his executors to continue to carry on business with his surviving partners, does not authorize the executors to embark any new capital in the business.

Hearing at Hamilton, on the 10th of November, 1866,  
before Vice-Chancellor *Mowat*.

Mr. *Robertson* for plaintiff.

Mr. *Proudfoot* and Mr. *Holmested* for the defendant  
*John Fiske*n.

The bill was *pro confesso* as against the other defendants.

Cases cited: *Ball v. Harris* (a), *Shaw v. Borrer* (b), *Collingwood v. Russell* (c), *Colyer v. Finch* (d), *Robinson v. Lowater* (e), *Wrigley v. Sykes* (f), *Exp. Garland* (g), *Hankey v. Hammond* (h), *Cutbush v. Cutbush* (i), *Thompson v. Andrews* (j).

MOWAT, V.C.—The plaintiffs are four of the bene-Judgment.  
ficiaries under the will of *James Smith*, of Dundas, merchant tailor; and the question between the parties is, whether certain mortgages, executed by the trustees and executors and the other beneficiaries under the will, on certain real estate of the testator, affect the plaintiffs' interest in this property under the will.

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(a) 4 M. & C. 264.

(b) 1 Keen, 559.

(c) 10 Jur. N. S. 1062.

(d) 5 H. L. 902.

(e) 5 D. M. & G. 272.

(f) 21 Beav. 337.

(g) 10 Ves. 110.

(h) In note to *Ex parte Richardson*, 3 Madd. 148.

(i) 1 Beav. 184.

(j) 1 M. & K. 116.

1867.

Smith  
v.  
Smith.

The testator carried on business with *Wm. Smith* and *James Snow*, under the firm of *Smith, Snow & Co.*, and his capital in the business, over and above all debts, was about £800. He also owned the real estate in question. By his will he, amongst other things, charged his estate, real and personal, with his debts, and devised his real estate to his wife for life, or during her widowhood, with remainder to his executors, in trust, so far as relates to such remainder, to sell the property and divide the proceeds among all his children equally. Then followed the following clause: "Fifth—It is my will and desire that my said wife, hereinafter named as my executrix for that purpose, should continue and carry on the business with the surviving members of the firm of *Smith, Snow & Co.*; my said wife to hold the same share and interest in the said business as I now do; and that said business to be carried on for the benefit of my said wife and family now under her care and charge." The testator named his two partners and his widow the executors and executrix of his will.

Judgment.

The testator died in October, 1853; and the business was continued as directed by the will. In 1856 the parties began to be embarrassed, and the two mortgages in question were executed respectively on the 23rd of April, 1856, and 5th of May, 1857. The first was a mortgage to one *Craddock*, and was for money borrowed to carry on the business, and the other was to the defendant *Fisken* to secure the running account of *Ross Mitchell & Co.*, for goods furnished theretofore, and to be furnished, by that firm for carrying on the business. *Craddock's* mortgage has since been assigned to *Fisken*.

All the debts due by the testator and his firm had been paid before these mortgages were given.

It is contended on behalf of the defendant *Fisken*, that the will gave power to the trustees to sell or mortgage the testator's real estate, if it should be

deemed expedient, to provide funds for carrying on the business. The case of *McNeilly v. Acton* (a) is a direct authority against this contention. A sale or mortgage for such a purpose would be a breach of trust. All that a will, which directs the testator's business to be carried on, authorizes executors to do, is, continue in it so much of the testator's estate as may be embarked in it at the time of his death.

1867.

Smith  
v.  
Smith.

There is no ground for the pretence that *Craddock* made the advance to the executors and trustees under the supposition that it was obtained to pay the debts of the testator; for the mortgage itself does not speak of the advance as made to the executors, but as made to all the parties executing the mortgage, including the widow (since deceased) and such of the testator's children as were then of age. The mortgage to *Fisken* is still more explicit as to its object.

The decree will declare that the mortgages do not affect the plaintiffs' interest in the morgaged premises; will restrain the ejectment suits, so far as relates to the plaintiffs; direct a sale of the property; and order payment to plaintiffs of their shares. The shares of the beneficiaries who executed the mortgages, to be paid to *Fisken* on account of the mortgages. *Fisken* to pay the plaintiff's costs to the hearing. No costs to any party subsequent to the hearing.

Decree.

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(a) 4 DeG. McN. & G. 744.

1867.

## MCDONALD V. CAMERON.

*Sheriff's Sales.*

A Sheriff to whom a writ against lands is delivered for execution, should make reasonable inquiries as to what property the execution debtor has, and what interest in it he possesses; should not advertise more of the lot than he finds the debtor is interested in, and if he knows what the debtor's interest in the same is, he should give such statement of it in the advertisement as a provident owner would; and in regard to these matters he is not justified in acting irregularly by the instructions of the plaintiff's attorney against his own judgment.

A third person who purchases and gets the Sheriff's deed is not affected by irregularities on the part of the Sheriff, unless the circumstances are such that the purchaser's taking the deed can be said to amount to a fraud.

If the execution creditor purchases as either principal or agent, and it appears that he or his attorney interfered with the conduct of the sale by the Sheriff, and that through such interference the sale was not properly advertised or conducted, and took place under circumstances of disadvantage to the debtor, the sale cannot be maintained except as a security for the debt, provided the question of the validity of the sale is presented for adjudication without delay, and before the property has passed into the hands of a third party.

Hearing at Cornwall at the sittings held there in the autumn of 1866.

Mr. *J. S. McDonald*, Q. C., and Mr. *D. B. McLennan* for plaintiff.

Mr. *James McLennan* for defendant.

*Witham v. Smith (a)*, *Malloch v. Plunkett (b)*, *Fitzgibbon v. Duggan (c)*, *Kerr v. Bain (d)*, *Chalners v. Piggott (e)*, were cited.

Judgment. MCWAT, V. C.—The question in this case is as to the validity of a Sheriff's deed by virtue of which the plaintiff claims the right of redeeming a mortgage held by the defendant.

(a) 5 Gr. 203.

(c) 11 Gr. 188.

(b) 9 Gr. 556.

(d) 11 Gr. 423.

(e) 11 Gr. 475.

One *Donald McDonald*, the plaintiff's brother, recovered a judgment against *Andrew Rose* and *Charles Rose*. In 1862 he placed a writ against their goods in the Sheriff's hands for execution; and on the 29th December, 1864, a writ against their lands—the latter indorsed to levy \$210 49, with interest from 26th December, 1864, \$10 for writs, and the Sheriff's fees and expenses. The plaintiff's attorney instructed the Sheriff to sell under this writ the west half of lot No. 8 in the 1st concession of the Township of Charlottenburg. Only one of the defendants, *Charles Rose*, had any estate or interest in any part of this lot; and his interest was in the westerly part only, consisting of a little over fifty-nine acres. These facts were well known to the execution creditor and his attorney.

1867.

McDonald  
v.  
Cameron.

The west half comprised somewhat more than 109 acres; some years before the transaction in question a mortgage had been executed on the whole west half in favor of one *John Cameron* now deceased; and *Charles Rose* afterwards sold the easterly fifty acres to the said *Donald McDonald* for \$900, out of which the purchaser was to pay off the mortgage. He did not pay it off, however, nor has he paid it off yet; but it is said that he procured a release from the mortgagee of the westerly fifty acres of the west half, leaving the mortgage to be still a charge on the remaining few acres which *Rose* had not sold to *McDonald*, and (it is said) not registering the release, so that, until after the Sheriff's sale, the mortgage, contrary to the fact appeared at the registry office to be still a charge on the whole fifty-nine acres which *Rose* owned. Judgment.

Afterwards, namely on 29th December, 1863, *Charles Rose* executed a mortgage to one *Andrew Summers* on the east half of the west half (of lot 8, to secure \$241 50, with interest, which mortgage has been assigned to the present defendant, *John A. Cameron*, and is the mortgage which the plaintiff here is claiming to redeem.

1867. The plaintiff at law *Donald McDonald*, or his attorney communicated to the Sheriff none of the facts relating to the title, but the Sheriff was aware that *Donald McDonald* owned part of the west half, and that the defendant here (Mr. *Cameron*) had a mortgage against *Charles Rose*, and the Sheriff erroneously supposed that this mortgage was on the whole of that part of the lot which *Rose* still owned.

McDonald  
v.  
Cameron.

Judgment.

In the advertisement which the Sheriff drew, he followed the instructions of the plaintiff's attorney, and inserted the whole west half of the lot as the property the interest of the defendants in which was to be sold, not specifying what that interest was, whether an estate for life or in fee, whether as owner, mortgagee or mortgagor, or whether a legal or an equitable estate. This advertisement announced that the sale would take place on the 13th January, 1866, and was published in the *Canada Gazette* six times, the last insertion being on the 18th November, 1865, or nearly two months before the day of sale. The plaintiff's attorney instructed the Sheriff not to advertise in the local newspapers, though two were published in Cornwall, where the sale was to take place, and though both had a circulation in the neighborhood of the property, as well as elsewhere. The Sheriff himself was in favor of advertising in one or other of these papers; but he followed the instructions of the plaintiff's attorney and forbore to do so, and says the attorneys in Cornwall refuse to pay the expense of advertising in the local newspapers. The Sheriff put up on the court room door a manuscript copy of the advertisement, and afterwards a copy cut from the *Canada Gazette*. No other publicity was given to the advertisement.

The Sheriff gave to the execution creditor another copy cut from the *Gazette*, to put up on the door of a shop near the property, a post office being kept in the same shop; but the execution creditor, by mistake I assume, put up the side with the advertisement against the door, leaving the back alone visible.

*Charles Rose* (who was a witness, and seemed to be a man below the average of his class in point of intelligence, though, apparently truthful and frank) knew nothing of the sale until about a fortnight before it took place, when he was informed of it by the execution creditor himself, who attempted to buy part of the property from him for \$600. *Rose* refused the offer, and applied to his relative, the present defendant, for an advance of money to save his land. The defendant agreed to his request; and it was arranged that the two defendants and their wives should unite in a mortgage to secure the money, it being left to Mr *James Bethune*, the defendant's solicitor, either to prevent the sale by paying the money, or to buy in at the sale; and Mr. *Cameron* left with him a blank check which Mr. *Bethune* was to fill up in either case for the amount required. The defendants and their wives were to come in on the morning of the sale and execute the necessary instrument. Mr. *Bethune* found it necessary, however, to leave town on business before they arrived, and he therefore informed the Sheriff of the instructions and cheque he had received—said he would ratify whatever his brother and clerk, Mr. *William Bethune*, would do in the matter, and requested the Sheriff to wait for the money until his return; to which the Sheriff agreed. Mr. *Bethune* then gave the necessary instructions to his brother; repeated what had passed with the Sheriff; told his brother to attend at the sale, and bid to the amount necessary to satisfy the execution and expenses; and intimated that there would probably be no competition. The defendants came into town at too late an hour to have any papers completed before the sale. *Charles Rose*, however, called at Mr. *Bethune's* office before the sale, and at the suggestion of Mr. *William Bethune* accompanied him to the Sheriff's office.

1867.

McDonald  
v.  
Cameron.

Judgment.

Very few persons were present, but the sale proceeded; it took place in the Sheriff's room; the only bidders were the creditor's attorney, who offered

1867. the first bid, the creditor himself and Mr. *William Bethune*, who made two bids each. The creditor's first bid was \$268, which was the amount necessary to satisfy the execution and expenses. Mr. *Bethune* bid \$270, but would bid no more, fancying he was limited by his instructions to this sum, and not, apparently, having the experience or knowledge necessary to determine what in the emergency he should do. The Sheriff did not accept this bid as final, though he was aware, or correctly believed, that Mr. *Bethune* was bidding on behalf of *Rose*, but called for more bids, and knocked the property down to the execution creditor for \$280, being a small advance over the amount needed, and bid by Mr. *Bethune*.

McDonald  
v.  
Cameron.

Judgment.

When a memorandum of the sale was drawn up, the execution creditor stated that he had bid as agent for his brother *Archibald*, the present plaintiff, and accordingly *Archibald's* name was inserted in the contract, and his own struck out.

All this took place on Saturday, the 13th of January.

Mr. *James Bethune* returned on Monday, the 15th, and, learning what had been done, he on the following day tendered to the Sheriff the amount necessary to satisfy the execution and all expenses, and served notices on him and on the plaintiff's attorney objecting to the validity of the sale. The plaintiff, however, insisted on his purchase. *Donald McDonald* gave the Sheriff a receipt for his debt, and paid him the balance of the bid in money. A deed to *Archibald* was executed by the Sheriff on the 22nd January. Some negotiations then took place, but they were ineffectual; and the present bill was filed on the 24th February, upon a mutual understanding between the Solicitors of the parties that the question as to the validity of the transaction should be tried in this suit.

The defendant now contends that the facts of the

case shew several irregularities in the proceedings, and several faults in the conduct of the parties; and that these are sufficient to invalidate the sale, though it has been carried out by conveyance.

1867.  
 McDonald  
 v.  
 Cameron.

To succeed in this defence, it is not sufficient for the defendant to shew irregularities and faults that were calculated in some degree to damp the sale; for such may sometimes exist, of a kind and to an extent that would subject the Sheriff to an action for damages, or that would disentitle a purchaser to enforce his contract either by rule of a law court or by suit here, and yet not avoid a conveyance executed. This distinction is well settled both at law (*a*) and in equity.

First, then, have there been any irregularities or other objectionable proceedings here? No doubt there have.

It is to be borne in mind that the Sheriff is not the agent of an execution creditor any more than of the execution debtor. His office is to execute the writ in the manner most for the advantage of both parties (*b*). He is bound to act, so far as lies within his authority, as a provident owner would in disposing of his own property, and is to make all reasonable inquiries beforehand as to what property the debtor has, and what estate or interest in it he possesses. How else can he know whether it is saleable or not under the execution in his hands? or whether the sum offered at the sale is such as consistently with his duty he may accept? (*c*.) A chattel interest in land is only saleable under an execution against goods; a freehold interest is only saleable under an execution against lands; and some interests are not saleable at law under either writ, and can only be reached, if at all, through

Judgment.

(*a*) *In re Campbell and Ruttan*, 10 U. C. Q. B. 641.

(*b*) *Bethune v. Corbett*, 18 U. C. Q. P. 507, 516.

(*c*) *Keightly v. Birch*, 3 Campbell, 520; Sug. V. & P. 60, *et seq.*, 14th ed., ch. 1, sec. 5; *Young v. Baby*, 4 U. C. C. P. 537.

1867. this court. So, again, according to the interest a man has in property, and its being or not being incumbered, his interest may be worth £10,000, or may not be worth as many farthings. It is manifest that the notion which is said to prevail, that a Sheriff may satisfy himself with knowing or imagining that the debtor has some interest, either at law or in equity, in some portion of a specified lot, conflicts with the familiar necessities of his position. Sheriffs have the same duties in regard to sales as assignees in bankruptcy and insolvency; trustees for sale; mortgagees with power of sale; or other persons having the duty or power of selling the land of others (a).

McDonald  
v.  
Cameron.

Judgment.

Now the Sheriff here made several mistakes. He did wrong in accepting the dictation of the plaintiff's attorney as to the mode of publishing the advertisement of sale, contrary to his own judgment. In this he was abdicating his own peculiar functions; and was transferring to the plaintiff's attorney the discretion which it was the intention of the law that he should himself exercise in view of the interest of both parties. The mode of advertising which under this pressure was adopted, was under the circumstances objectionable, and even ridiculous. If it has from a like cause been practised in other cases, it was not the less objectionable, or the less ridiculous; but it is the more important that the proper course should be distinctly stated, and for the future better understood. I entirely concur in the observation made by the learned Counsel for the defendant, that the publication provided for by the act is prescribed as the minimum publicity which is to be given to a Sheriff's sale under any circumstances, in any county, at any time; but that it was never intended that the publicity should in all cases be confined to the *Canada Gazette* and posting up at the court-house door, or in the office of the Clerk of the Peace, a manuscript notice, or a notice in small print cut out of the

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(a) *Vide* Ord v. Noel, 5 Madd. 433; Harper v. Hayes, 2 Giff. 217, Sug. V. & P. p. 60, sec. 5, pl. 1; Bethune v. Corbett, 18 U.C.Q.B. 507.

*Gazette*. There may be no local newspaper in a county, or the charges of the local newspaper may, by reason of its monopoly, be exorbitant, and it may, for these and other reasons, be inexpedient to exact such publication in every case. Indeed, all the directions given by the statute have been expressly held at law to be directory only, and not conditions precedent to the right of selling. But it was convenient that the statute should name some one place where a person may always ascertain whether property in which he is interested is under advertisement by the Sheriff; and, accordingly, one journal was appointed, the *Gazette*, in which all the Sheriff's advertisements of sales under executions against lands throughout the whole Province are to be recorded; and two places in the county are named, in one or other of which a party may safely assume that the advertisement in which he is interested will be found, if any such advertisement is in existence, and is not published in a local newspaper. With these instructions, the law leaves to the judgment and discretion of the Sheriff what further publicity to give to a sale; and if, with a view to the information of expected bidders and purchasers, a Sheriff confines himself always to what the statute exacts as the minimum publicity required, is it not plain that this must often be a mere formal and illusory compliance with his duty? (a)

1867.  
 McDonald  
 v.  
 Cameron.

Judgment.

I am sure the Sheriff here meant to do what he supposed to be his duty; but what owner of property would think of making his intention to sell it known by such means as those taken in the present case, and no other? How often are private sales of property advertised in the *Gazette*? or a notice of them put up on the court house door, or in the office of the Clerk of the Peace? And what agent for sale would be thought to understand his duty who should adopt either mode of advertising? or would be content with a manuscript advertisement, or an

(a) Vide *Oswald v. Rykert*, 22 U. C. Q. B. 305.

1867. advertisement in *Gazette* type and cut from the columns of a newspaper? There are methods of making public intended sales of lands which experience has led to be adopted, and which are well known, varying only according to the nature and value of the property, and which are in substance practised in the case of all private sales, as well as sales by trustees, assignees in bankruptcy, Masters in Chancery, and all others having to do with such sales, either as principals or agents, either as public officers or private proprietors or trustees; and what possible reason of law or equity can there be for holding that Sheriffs, who have so many sales to conduct, sales in which the unfortunate are interested, should be at liberty to disregard every method of making the most of property which experience has pointed out as desirable, and to substitute no other for which an equal advantage, or any thing like an equal advantage, can be or is pretended? Such a notion is without any countenance from reason, or from any case that I have seen either at law or in equity. The obligation of Sheriffs in this respect, as compared with that of ordinary trustees, agents, and the like, is rather *a fortiori*.

Judgment.

There were other mistakes.

It was wrong to advertise the sale of property which did not belong to the defendants. It was against the letter of the statute; deceptive towards the public; and not calculated to further the object of making the most of the property, but the reverse. The statute requires the Sheriff to specify in such an advertisement "the particular property to be sold," (a) and it is, unquestionably, no compliance with this requirement to name, not the property to be sold, but a whole block, or lot, or half lot, when the defendant is only entitled to an easily distinguished portion of such block, or lot, or half

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(a) Consol. Com. Law Procedure Act. sec. 267, p. 243.

lot. It certainly was not intended in the present case to sell as the defendants' more of the west half than either of them owned; and to describe more, was plainly, not specifying "the particular property to be sold." These loose, unmeaning, unreliable descriptions have contributed not a little to the low prices habitually obtained at Sheriffs' sales. A subsequent clause of the statute (*a*) requires the advertisement to give "some reasonably definite description of the land," a direction which this advertisement certainly did not comply with.

1867.  
 McDonald  
 v.  
 Cameron.

So, also, the practice of Sheriffs in merely advertising, as was done in the present instance, the "interest of the defendants, both at law and in equity, in the west half," &c., is, as a general rule, objectionable. No provident owner would advertise in these terms, keeping back the nature of the interest to be sold; no agent would think of doing so, or be allowed to do so; and no public officer or private trustee can justify such a form of advertisement, if objected to at the proper time. If the title is clear and unincumbered, or if the nature of the title and of the incumbrances on it is known, an advertisement in this vague form is unnecessary, and, if unnecessary, is by all means to be avoided; for, instead of inviting and attracting purchasers, it deters and warns away the most desirable class of purchasers, and announces the sale as a lottery, from which all but the few who have a personal knowledge of the title, are to keep away, unless the chances of a lottery or the allurements of a law suit have an attraction for them. In the case of lands as well as of goods (*b*), it is the clear duty of a Sheriff to make all reasonable inquiries to ascertain the extent of the debtor's interest in the lands which the Sheriff purposes advertising, or is desired to advertise; it is the duty of plaintiffs to afford the Sheriff all the information such plaintiffs possess; and then it is the duty of the Sheriff

Judgment.

(*a*) Section 268.

(*b*) *Hutchings v. Ruttan*, 6 U. C. C. P. 452.

McDonald  
v.  
Cameron.

1867 to state briefly in his advertisement what he knows of the debtor's estate and interest in the matter, in the same way as he would do as if he was about to sell a like estate or interest of his own in the same property. Here the execution creditor and his attorney were familiar with all the facts relating to the title, except, possibly, the amount due on the mortgage which the present suit is brought to redeem; and this, if not known, could no doubt have been ascertained accurately, without the slightest difficulty, by applying to the mortgagee, who lives near Cornwall, and whose general Solicitor resides in that town. There are decided cases in which the Courts have refused to give effect to sales from the mere uncertainty as to the interest sold (*a*). Of this the cases of *Bebee Tokai Sherob v. Beglar* before the Privy Council (*b*), and *Malloch v. Plunkett* (*c*), *Fitsgibbon v. Duggan* (*d*), *Kerr v. Baine* (*e*) and *Chalmers v. Pigott* (*f*), in this Court, are examples.

Judgment.

I think the Sheriff was in error, too, particularly after what had occurred between him and Mr. *James Bethune*, in not pausing when Mr. *William Bethune*, on behalf of the debtor, bid a sum sufficient to satisfy the execution and all expenses, and in not either knocking the property down to him, or immediately ascertaining, in case there was any misunderstanding as to waiting until Mr. *James Bethune's* return for payment of the amount, whether Mr. *Rose*, or Mr. *William Bethune*, who was bidding for him, was prepared with the money (*g*). The only legitimate purpose of the sale was to make this money; and, this object accomplished, no one had a right to demand that the sale should go on. I think the Sheriff should have paused at this stage of his proceedings, on the same principle that he is not at liberty to proceed with a sale after a tender is made to him of the amount

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(*a*) 11 Gr. 188. (*b*) 6 Moo. Ind. App. 510. (*c*) 9 Gr. 536. (*d*) 11 Gr. 190. (*e*) 12 Gr. 423. (*f*) *Ib.* 475.

(*g*) *Neap v. Abbott* 1 Coop Temp. Cottenham, 382; and the cases collected in Sug. V. & P. 215, 14th ed., and in Fry on Spec. Perf. sec. 547 to sec. 250.

of the execution and expenses, or to make further sales after sufficient has been sold to cover the amount (*a*). In the latter case it has been expressly laid down that the fact of the price of goods already sold not having been actually paid, is no excuse for further sales, and "that the Sheriff is not justified, after he has sold as much as apparently satisfies the writ, is going on to sell more, upon a speculation that it is possible that actual delivery of such goods as he has already sold, may be prevented by some loss or accident for which he is not answerable" (*a*).

1867.

McDonald  
v.  
Cameron.

But while the proceedings at and before the sale are open to these observations, is the sale void, and can it be objected to after conveyance?

At law it has been held in several cases that irregularities and defects in the form or publication of the advertisement, or in other matters preliminary to the sale, do not effect a purchaser who has paid his purchase money and got his conveyance, whether he purchases at the sale, or subsequently from the execution creditor in case the latter was the Sheriff's vendee (*b*). In all such cases the parties aggrieved are left to their action against the Sheriff, if they suffer through any neglect of duty on his part. Similar principles have been acted on in equity; in the case of sales under decrees (*c*), and have also been recognized where the title depends in part on legal proceedings (*d*). They apply also to a considerable extent to sales by trustees, and persons filling a fiduciary character, where the taking of the deed cannot under

Judgment.

(*a*) Alfred v. Constable, 6 Q. B. 382.

(*b*) Jarvis v. Brooke, 11 U. C. Q. B. 299; Paterson v. Todd, 24 *Ib.* 300; Osborne v. Kerr, 17 *Ib.* 141.

(*c*) Bowen v. Evans, 1 J. & La T. 214, and cases cited; Dart on Vend. p. 773, 3rd ed., ch. 19, sec. 5.

(*d*) Vide Baker v. Morgans, 2 Dow. 533.

1867. the circumstances be said to amount to a fraud on the part of the grantee (a).

McDonald  
v.  
Cameron.

I may refer to *Borell v. Daun* (b), before Sir James Wigram, as affording a fair illustration of the doctrine of equity on the subject, That was the case of a sale by assignees in insolvency, and the bill was to set it aside, but the Court refused this relief though the case was such that the learned Judge stated his "opinion to be that the plaintiff had reasonable cause to complain of the conduct of the assignees and their agents, as well as of his own agent, in respect of the manner in which this part of his property had been dealt with." The Vice-Chancellor also observed, "It must be remembered that I am not called upon to give the purchaser the assistance of this Court in obtaining the completion of his contract; his contract was perfected by conveyances before the bill was filed;" and again, "I must repeat, that I give no opinion, whether, if this contract rested *in fieri*, the Court, upon the whole case, might not have found an excuse for relieving the plaintiff from this sale."

Judgment:

The objection was there, as it is here, that the manner of effecting the sale was objectionable; but the Court said, that was a "subject collateral to title. It depends upon circumstances,—upon discretion,—perhaps, upon the conduct of the insolvent; upon the interests of the creditors, having regard to the life-interest with which they had to deal; upon the actual state of the title and property; upon the documents of title which the assignees had, or had not; upon a hundred minute circumstances; to a knowledge of which the most elaborate investigation of the title would not necessarily lead, and of which (not having actual notice)

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(a) *Wright v. Maunder*, 4 Beav. 512; *Davey v. Durant*, 1 DeG. & J. 535.

(b) 2 H. 446.

the purchaser was not bound to inquire. If I am to hold that a purchaser is under a positive obligation to inquire into a collateral question, such as the manner of selling, I shall in effect impose upon every purchaser from assignees. at a public auction, a fiduciary character as between him and the owner of the estate. If \* \* \* none of the facts relied upon would, separately taken, furnish a ground for rescinding an executed contract, I cannot, in a case depending so much upon circumstances and discretion in the assignees, hold, that the purchaser is within the scope of any equitable rule affecting the validity of his purchase, only because those facts, collectively taken, may have had some effect in damping the sale."

1867.

McDonald  
v.  
Cameron.

After remarking on the circumstances relied on by the plaintiff, and shewing they were not such as entitled the Court to say it was a fraud in the purchaser to accept a conveyance, the learned Judge made the following further observations:—"The only other acts of carelessness in the conduct of the sale, which are not referable to adequacy of consideration only, are the delay in publishing the conditions of sale until the day of sale, and the stipulations as to title. It is impossible to hold that these are acts of such a depreciating character as to involve the purchaser in a breach of trust. A decision that these are circumstances which should invalidate a conveyance, would, in effect, determine that a purchaser from assignees at a public auction, is, in principle, bound to take upon himself a fiduciary character to the extent of seeing (not merely that the conveyance he accepts is not a breach of trust, for to that extent I might be bound to go), but that they have exercised their discretion in the conduct of the sale in the manner most favourable to the interests of the insolvent." The conclusion to which the learned Vice-Chancellor came in regard to this part of the case, he thus states:—"In a case in which concert with assignee is not to be imputed to the purchaser, I think he might lawfully complete his contract, notwith-

Judgment.

1867. standing he had notice of the acts complained of by the plaintiff."

McDonald  
v.  
Cameron.

Judgment.

The conveyance in that case was executed soon after the contract, and with notice of the plaintiff's objections to the sale; and this circumstance was urged as a reason why the purchaser should not be in a better situation than if the contract was still *in fieri*; but in answer to this argument the learned Judge observed:—"It was said, indeed, that the completion of the contract was a hurried transaction, and that for the purpose of giving the purchaser the advantage I have just alluded to; and it would perhaps be difficult for the defendants successfully to contend that the observation was not, to some extent, well founded. But to what does the charge amount? If the circumstances of the case are such as entitle the plaintiff to avoid the transaction, on the grounds of fraud or breach of trust, the execution of the conveyance to the purchaser will not deprive the plaintiff of that relief, and, if the circumstances of the case are not in other respects such as to entitle the plaintiff to avoid the transaction, I cannot deprive the purchaser of the benefit of his contract only because he has used diligence in placing himself in the position most advantageous for maintaining his right. The utmost effect I can give to the precipitancy imputed to the purchaser is, that of scrutinizing with the greater jealousy the other grounds which have been relied upon for impeaching the sale. And certainly I stand in no need of any such circumstance to induce me to scrutinize the facts of this case with the utmost jealousy. But still I must deal with the case as one in which I am called upon, not specifically to enforce a contract at the suit of a purchaser, but to rescind a sale perfected by conveyance. I may observe, that notice to a purchaser before conveyance, that a bill would be filed to impeach his purchase, is only notice that all valid objections would be taken to it."

In the same case an unsuccessful attempt was made to

shew that the property was sold at a gross undervalue, as the result of the conduct of the assignees; and if in connection with the objections to this sale already adverted to, gross undervalue had been clearly established, it might not be necessary to observe upon some features of the case to which I have yet to refer (*a*). But the evidence of value is contradictory. The preponderance, however, is with the defendant, and I have no doubt that the price obtained in the present case was a gross undervalue, as compared with what the owner of such a lot, having no occasion to sell at a sacrifice, would have accepted for it, or what a man would be willing to give who was looking out for such a lot to occupy. But I cannot say that the price was greatly below what like lots appear to have been sold for at some other Sheriff's sales, of which evidence has been given. But if the case turned on this point it would have been my duty to give more thorough consideration to the evidence bearing upon it than, in the view I take of the other points in the case, I have found necessary. Judgment.


1867.

McDonald  
v.  
Cameron.

It is to be remembered that the purchase here was made by the execution creditor, though he says as agent for his brother, the plaintiff here; and it was his brother's name, that by his direction the Sheriff, after the property was knocked down, inserted in the memorandum made and signed by the Sheriff as to the sale; it was the execution creditor who alone bid at the sale, though his brother was present: he gave a receipt to the Sheriff for the amount of the debt; and it was he who paid the Sheriff the balance, with (he says) money his brother gave him for the purpose; the brother has not yet paid any part of the debt, and for months did not give any note or memorandum acknowledging a liability to pay it; it was the execution creditor who gave the instructions for the present suit, and who has attended to it ever since; and he says that his brother has pro-

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(*a*) Vide *Fitzgibbon v. Duggan* 11 Gr. 190.

1867.  mised him the preference as soon as he is able to buy the property. I have no doubt that the purchase was really made for the creditor himself, though in his brother's name; and, perhaps, the money paid to the Sheriff, and the money to be paid to the defendant here if this suit for redemption should be successful, may be the money of the brother, to whom the property will be a security for its repayment. But for the purpose of the defence the point is not material, the rule here being that a person who is disqualified from retaining a purchase made by himself, is disqualified equally from making a valid purchase as agent for another (*a*); and the contention of the defendant is, that the execution creditor was so disqualified. In this I agree, and am of opinion that such disqualification, in connection with the other circumstances to which I shall refer, is, in equity, sufficient to sustain the defence.

McDonald  
v.  
Cameron.

Judgment.

The disqualification is not founded on the mere circumstance of his being the execution creditor. It has been long settled both at law and in equity (*b*) that an execution creditor may purchase, such a creditor not being in the position of a mortgagee, trustee, or agent, who is himself the seller, and the right of buying being essential for the creditor's own protection. So, in the case of Chancery sales, and sales in Bankruptcy (*c*), a mortgagee or other party interested is allowed to bid and to buy, where the Court can give the conduct of the sale to some one else, and where no injustice to other parties is apprehended from giving such leave. Of Sheriff's sales the Sheriff has the conduct. The law casts on him the duty of preparing the advertisement in such terms as he may think best fitted for the occasion; he is to fix the day for the sale; to select the local newspaper in which the advertise-

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(*a*) *Coles v. Trecothick*, 9 Ves. 248; *Exp. Bennett*, 10 Ves. 383.

(*b*) *Stratford v. Twynam*, Jac. 418.

(*c*) *Ex parte McGregor* 4 Deg. & S. 409.

ment is to be published ; and to perform whatever other duty is involved in the conduct of the sale. Whatever discretion is to be exercised in regard to these matters, he is the party to exercise it. At such sales, therefore, it is right that the creditor should be at liberty to bid, and should not be responsible for the regularity of the Sheriff's proceedings or for the manner in which he exercises the discretion the law vests in him ; and mere irregularities in the proceedings on the part of the creditor's attorney, not tending to depreciate the price or deter purchasers, if not objected to before the sale, may not after conveyance avoid his purchase.

1867.

McDonald  
v.  
Cameron.

Still, an execution creditor purchasing is not necessarily in the same advantageous position for resisting an attack upon the sale as a third person would be. What, for example, if, from a misapprehension of his duty, the Sheriff allows the creditor to direct him, to the prejudice of the debtor, in regard to matters within the Sheriff's control ? What if the Sheriff does not exercise his own discretion, but, through the pressure of the creditor or his attorney, accepts and acts upon the instructions of the latter, even while they are such as are in themselves to be condemned, and as the Sheriff himself disapproved of ? What if the Sheriff abandons to the creditor what the law meant that the Sheriff himself should decide ? What if, through the misinformation and interference of the creditor, the sale is advertised and conducted under circumstances of such improvidence that the Court could not, consistently with its settled rules, enforce the contract if it was *in fieri*, or would restrain the execution of it by the Sheriff, if the debtor, or those acting on his behalf or claiming under him, come with promptitude for relief ?

Judgment.

I apprehend that, upon all the authorities, but one answer can be given to such questions (*a*). The prin-

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(*a*) Vide Lord Crantown v. Johnson, 3 Ves. 170, S. C. 5 Ves. 278; Talbot v. Minnett, 6 Ir. Eq. 94, 95 ; Jenkins v. Jones, 2 Giff. 99 ; Bethune v. Caulcut, 13 U. C. Q. B. 511.

1867. ciple on which a purchase by an execution creditor and persons in a like position is sustained in this Court, does not apply to such a case. An execution creditor so thrusting himself into the conduct of the sale to the prejudice of the debtor, can no more purchase than the Sheriff himself or his deputy could; and if such a sale is carried out by conveyance, such conveyance must on proper terms be set aside.

McDonald  
v.  
Cameron.

Judgment.

Delay in disputing the sale might, indeed, cure the defect long before the Statute of Limitations would operate or might disentitle the debtor or those in his interest to relief except on special terms. But here the intended sale was not known to the debtor until shortly before the 13th of January, when it was to take place. It took place in the absence of the Solicitor for the execution debtor, who is also the Solicitor for his friend the present defendant. On Monday, the 15th January, the Solicitor returned to town, and on Tuesday he tendered the money, and gave formal notice of his objection to the sale. Negotiations then took place, and the present bill was filed immediately after they proved ineffectual, viz., 24th of February, 1866. There has, therefore, been no delay whatever in raising the question; no new equities have arisen from improvements or otherwise; and the property is still in the hands of the creditor or his principal.

I decide this case on the equitable grounds I have explained. Were I sitting as a common law Judge, it does not occur to me that I should hold that an execution creditor who interferes with the Sheriff's duty disqualifies himself from becoming the purchaser; for at law such a purchase would, I presume, have to be held void absolutely, if at all, courts of law having no power to impose terms; and would have to be held void against subsequent purchasers from the Sheriff's vendee, as well as against the Sheriff's vendee himself; and to be open to impeachment at any time within the statutory

period applicable to other cases. The courts of law are thus obliged either to hold all such deeds valid, leaving this court to deal with exceptional cases; or to hold all invalid: and the former would, I apprehend, be the proper holding at law. So, in case of sales by executors to one of themselves, or to a nominal purchaser as trustee for them, courts of law do not interfere with such sales, but leave to equity the consideration of the cases in which the sales are to be upheld or set aside, and to impose proper terms on the party seeking relief against them; and equity deals with such sales according to its settled rules and principles (a).

1867.

McDonald  
v.  
Cameron.

The defendant offers to pay the amount of the plaintiff's bid, or supposed bid, and prays that the Sheriff's deed may be set aside.

Declare, that the plaintiff is entitled to hold the deed as a security for the amount of the execution, including costs and expenses, and the additional sum paid by the plaintiff to the Sheriff. The Secretary will ascertain the amount, and on payment of it into Court, plaintiff to release to defendant his interest under the deed subject to the trust in favour of *Andrew Rose* (for whose benefit *Charles* after the sale released his interest in the property). Liberty to apply. Plaintiff to pay defendant's costs.

Decree.

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(a) *Macintosh v. Barber*, 1 Bing. 50; Sug. Pow. 8th ed. 125.

1867.

## THOMSON V. MILLIKEN.

*Solicitor's bill—Negligence.*

On the common order by a client to tax his Solicitor's bill, the Master may take into consideration alleged negligence of the Solicitor as having occasioned the suit or rendered it useless, and therefore constituting a ground for disallowing the whole bill; or may consider negligence as affecting parts of the bill, and affording a ground for disallowing such parts.

This was a motion by way of appeal against the Master's certificate, bearing date 24th October, 1866, whereby he certified to the Court, that in proceeding under the orders to tax the bill of costs of the Solicitors for the plaintiff, it was contended, on behalf of the plaintiff, that the bill ought to be altogether disallowed on the ground of alleged negligence in the conduct of the cause; and also on the like ground that the said bill came within the provisions of order No. 45 of the general orders of this Court of June 1853; and particularly within the words contained therein, "and which were not calculated to advance the interest of the party on whose behalf the same were taken." On the other hand, the Solicitors contended, as to the first ground that the Master could not entertain the same without special directions, in the orders of taxation, for so doing; and as to the second ground, that the said general order, [No. 45,] referred to parts or portions of bills only, and not to the whole thereof. And the Master being called upon by the respective parties, for a ruling in the premises, he decided in favor of the contention of the plaintiff on both grounds.

Statement.

Mr. *Hamilton*, for the appeal.

Mr. *Blain*, contra.

The following cases were referred to—*Matchell v. Parkes* (a), *Jones v. Roberts* (b), *Re Page*, No. 2 (c), *Re Clark* (d), *Re Atkinson & Pegly* (e).

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(a) 8 Dowl. N.S. 924, S. C. 9

M. & W. 767.

(d) 1 D. W. & G. 51.

(b) 2 Dowl. N.S. 656.

(c) 32 Beav. 485.

(e) Chan. R. 193.

MOWAT, V. C.—The plaintiff in this cause took out an order of course for the taxation of his Solicitor's bills; and, in proceeding under it before the Master, proposed to shew that the whole of the costs charged therein should be disallowed, on the ground of negligence of the Solicitors. The Solicitors contended that the plaintiff could not object to the whole bills on the ground of negligence, but to parts only, without the special order of the Court. The Master overruled the objection, and, at the request of the parties, certified his ruling to the Court. The question now comes before me on an appeal against his ruling.

1867.

Thomson  
v.  
Milliken.

I am of opinion that the Master was right.

The practice at common law appears, from the cases cited for the appellants, to be different from the practice in Chancery.

In *Re Clark (a)*, it was held by the Master of the Rolls, and afterwards by the Lords Justices, that the whole of the costs of an action of replevin, which formed part of the Solicitor's bill, had been properly disallowed by the Master because the action was absurd and useless.

Judgment.

In the subsequent case of *Stokes v. Trumper (b)* the Solicitor brought in a claim for a bill of costs under a decree for the administration of the estate of the last survivor of his clients; and V. C. Wood disallowed the claim, observing: "I have examined the authorities, and I find they establish that where, as here, \* \* the business in question is the prosecution of a suit, and the Solicitor has, by his *crassa negligentia* in the conduct of that suit, caused it to be lost, he cannot recover any portion of his bill."

(a) 13 B. 173, S. C. 1 DeG. McN. & G. 49.

(b) 2 K. & J. 247.

(c) 26 Beav. 152.

1867.

Thomson  
v.  
Milliken.

*In re Atkinson (c)* the objection was to the whole bill of the solicitor, because of the uselessness of the suits for which the costs were claimed, and their having been brought without giving to the clients the advice they should have had ; and a special petition was presented on the express ground that, as the petitioner contended, upon an order of course the client must admit his liability for some part of the bills. It was contended, contra, that a special petition was unnecessary, as the taxing Master could, on a common order for taxation, take the matters complained of into consideration ; and the Master of the Rolls so held. He said : " I am of opinion that the taxing Master can go into these matters. That was the statement made by Mr. *Follett*, the taxing Master, *In re Clark*, and it was concurred in by the Lords Justices. Lord *Langdale* was also of opinion that the taxing Master had full authority to go into these questions. The petitioners must pay the costs of the petition." The subsequent case, *Re Page* No. 2 (a), before the present Master of the Rolls, is not inconsistent with these authorities.

Judgment.

Upon these authorities I am of opinion that, on the common order obtained by a client for the taxation of his Solicitor's bill, the Master may take into consideration alleged negligence of the Solicitor, as having occasioned the suit for which the costs are charged, or rendered it useless ; and if he finds such negligence established it is his duty to disallow the whole bill ; and if the alleged negligence is as to parts only of the bill, such parts are to be disallowed. But this rule would not sanction the Master's assessing unliquidated damages, when claimed by the client against his solicitor.

The order here contains the usual submission by the client to pay what the Master should find due ; but this cannot, I think, be regarded, under the later authorities, as excluding the considerations referred to ; though they

may result in the Master's finding that nothing is due. 1867.  
The plaintiff submits to pay what the Master finds to be due; but if the Master finds that nothing is due, there will be nothing to pay. Such a submission certainly would not exclude evidence of a payment exceeding the amount of costs taxed; and evidence of payment would not be more consistent with the submission than evidence of negligence.

The appeal must be dismissed with costs.

### PATON V. THE ONTARIO BANK.

*Simultaneous writs of fi. fa. against goods and lands.*

A judgment creditor had issued at the same time, and placed in the hands of the Sheriff, alias *fi. fas.* against goods, and *fi. fas.* against lands; the Sheriff by direction of the creditor made a seizure of goods; the writs against goods were afterwards and before sale thereunder withdrawn; but meanwhile the debtor had conveyed his land in trust for creditors:

*Held*, that the grantee was entitled in equity to restrain a sale under the *fi. fas.* against lands.

Where a rule for setting aside a *fi. fa.* against lands was discharged at law under a material error as to the facts: *Held*, no bar to relief in Equity, at the suit of the debtor's grantee of the lands.

This was a hearing at the sittings of the Court in Hamilton in the Autumn of 1866.

Mr. Proudfoot, for the plaintiff, cited *Doe Foster v. The Earl of Derby* (a), *Doe Smith v. Webber* (b), *The Earl of Oxford's Case* (c), *Williams v. Davies* (d), *Langton v. Horton* (e), *Doe Spafford v. Browne* (f), *Moore v. Kirkland* (g), *Andrews v. Norman* (h).

(a) 1 A. & E. 760.

(c) 2 W. & T. lead. cases Am. notes, p. 100.

(e) 3 Beav. 464.

(g) 5 U. C. C. P. 452.

(b) 1 A. & E. 119.

(d) 2 Sim. 461.

(f) 3 U.C.Q.B.O.S. 95.

(h) 1 H. & N. 725.

1867. Mr. Moss, for defendant, cited *Baker v. Morgans* (a),  

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*Edwards v. Ross* (b), *Jenkins v. Willock* (c); *Boswell v. Rykert* (d), *Chapman v. Boulton* (e), *Dickar v. Warne* (f), *Knight v. Colby* (g), *Juson v. Gardner* (h).

MOWAT, V. C.—The facts of this case as proved at the hearing of this cause at Hamilton, are substantially as I stated them in giving judgment on an application for an injunction (i). Alias writs against goods, and writs against lands, were placed in the Sheriff's hands simultaneously for execution. The Sheriff, by the written instructions of the plaintiffs' attorneys, seized certain stocks of the defendant *James Hamilton* on the 12th May under the *fi. fas.* against goods. On the 17th, *Hamilton* executed a conveyance of his lands to the plaintiff *Paton*. On the 22nd, the Sheriff abandoned the seizure of the stocks, and returned the writs against goods *nulla bona*.

Judgment. One of the plaintiff's attorneys said in his evidence that after the written instructions were given for seizing the stocks, he, at the debtor's request, consented not to proceed against the stocks seized, and that he verbally notified the Sheriff to that effect within a day or two after the seizure. If it would be proper to have some confirmation of the accuracy of the attorney's recollection as to this, the evidence does not supply it. The Sheriff recollects nothing of such a communication to him, and his deputy or bailiff knows nothing of it either. I think it probable, therefore, that whatever was said on the point was less definite and distinct than, calling the facts to mind eighteen months after they occurred, the attorney honestly supposes. If, however, his memory

(a) 2 Dow. 326.

(c) 11 C. P. 508.

(e) 8 M. & W. 249.

(g) 5 M. & W. 274.

(i) 12 Gr. 366.

(b) 9 Pri. 5.

(d) 22 U. C. Q. B. 309.

(f) 10 Bing. 341.

(h) 2 E. & App. 188.

is full and exact as to all that occurred, I do not see that the request of the debtor, and the plaintiff's attorney's assent to it, would suffice to render the writs against lands regular. Certainly what occurred on the occasion was not binding on the plaintiffs at law, or on their attorney, or any one else; and the Sheriff did not in fact withdraw from the seizure, or return the writs, until the 22nd May: until then it was quite optional with the defendants to insist on the seizure or not as they chose. This defence was unsuccessfully set up in the Court of Queen's Bench.

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This is the only new point which was taken at the hearing; but the points taken on the motion for the injunction were again argued.

It was urged that the seizure of the goods did not disentitle the plaintiffs at law to make the writs against the lands good by abandoning at any time afterwards seizure under the writs against goods. I have given renewed consideration to the cases, and my opinion on this point is against the execution creditors.

Judgment.

It was contended that the objection is one which the debtor alone could take, and which is not open to the plaintiffs, who became entitled to the property under the debtor's deed of the 17th May. The debtor's estate in the land is now vested in the plaintiff *Paton* in trust, and the plaintiffs seek to prevent the defendant from taking it from them by means of irregular executions. Why should they not have this right? The defendants have no superior equity to the plaintiffs, the object of the defendants being to obtain a preference for their debt over all others, and the object of the plaintiff's deed being to place the debts to the two banks on an equal footing; and numerous analogies appear to support the plaintiff's right to set up, for the purpose of maintaining their title to the property, every irregularity of which their grantor could have taken advantage. Thus, if there were irregularities in a tax

1867. sale, or a Sheriff's sale, which the original owner could have insisted upon, his grantee is in the same position. So, also, if any irregularity occurs in the examination of a married woman which she could set up, her grantee has undoubtedly the same advantage; and any irregularity in the execution of a will or power, is as open to the subsequent grantee of the heir or other person whom the irregularity affected, as it would be to the heir or other original party himself. I have been referred to no authority, and can perceive no reason, for holding that an irregularity like that in question here stands in a different position. Had the defendants deferred issuing their writs against lands, as they should have done, until after the alias writs against goods had been returned, or the seizure thereunder abandoned by the Sheriff, the deed would have had undoubted priority over the writs against lands, and I cannot see any good reason for giving the defendants priority in consequence of their having irregularly issued their writs against lands at an earlier period.

Judgment.

It was argued that the decision of the Court of Common Pleas is conclusive on the plaintiffs. Whether that decision were an estopped or not, I would follow it as a matter of course, if it were a decision on the case as it is; but it was unfortunately founded on the erroneous supposition that the original *fi. fas.* against goods had not been acted upon. Being founded on that material error, does the decision nevertheless bind the plaintiffs and estop them from taking any other proceeding.

The only case in the English Courts which was cited to me on the point, is the other way. I refer to *Williams v. Davies* (a), where the plaintiff had applied unsuccessfully to the Court of King's Bench to set off two judgments against each other, and the Vice-Chancellor, notwithstanding, refused to dissolve an injunction restraining proceedings on the judgment against

the plaintiff. The propriety of allowing the judgment to beset off, has been doubted or disputed; but any difficulty in the way of doing so in consequence of the action of the Court of King's Bench, does not appear to have been anywhere suggested. The point appears to have been expressly decided in the same way in the American courts (*a*), We are familiar with the illustration of it afforded by the case of awards, the well understood rule in such case being, that a refusal to set aside an award is no bar to a plea impeaching its validity in a suit upon the award (*b*); and that this is the effect in all cases seems to follow from (amongst other considerations) the rule against making a former judgment binding where the two suits are tried on different principles so far as relates to the admissibility of evidence (*c*); for a rule may be discharged on the deposition of the party resisting the application, and the witnesses on either side are not liable to cross-examination. The case seems rather to resemble a decision on a motion made here for an injunction or a receiver, which does not bind the parties if they choose to go on with the cause to a hearing. So, under the old practice in bankruptcy, an order refusing an application to supersede a commission, was no bar to the litigation of the same question between the parties in an action at law (*d*); and a judgment in ejectment is not held to conclude the parties to it.

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I think I must hold, therefore, that the decision of the Court of Common Pleas does not estop the plaintiffs.

It was argued that the question as to the regularity of the writ must at all events be tried at law, and cannot be the foundation of a suit here. Now, no doubt, as a general rule, one who has a plain and adequate remedy at law, cannot maintain a bill here; if his title is legal, and there is no technical difficulty in the way

(a) See Am. notes, 2 W. & T. Lead. Ca. 100.

(b) Stalworth v. Inns, 13 M. & W. 466

(c) Vide Tay. on Ev. 1497 a, and cases cited.

(d) Exp. White, 4 D. & C. 279.

1867. of his enforcing it in a court of law, he must resort to law. That is the rule, not only where the right depends on the regularity or irregularity of legal proceedings, but in all cases of a legal right. The defendant's contention, however, is, that even if, through the technical rules of procedure at law or any other cause, there is no way in which the plaintiffs can obtain a conclusive decision at law, and though this might entitle the plaintiffs to come here on any other ground than an irregularity of this kind, yet they are debarred from bringing into question this irregularity. It is to be observed that the irregularity may depend on a matter of fact on which the affidavits may be contradictory: here it depended, in the view of the Court of Common Pleas, on the fact as to whether the writs against goods were acted upon, and the court refused the application from supposing the fact to be that these writs had not been acted upon.

Judgment. *Baker v. Morgans* in the House of Lords (a) was cited in support of the defendant's argument on this point. That was an appeal from Ireland. A lessor, by means of an ejectment for non-payment of rent, had recovered possession of property of which a widow was at the time in possession as tenant for life under a lease for lives renewable forever; her children, who were infants, being entitled in remainder. Long after the children came of age, and after the lessor had been in undisputed possession for twenty-five years, they filed a bill for relief, on the ground, partly of alleged irregularity in the proceedings in the ejectment suit, and partly that according to the plaintiff's construction, the statute under which the lessor claimed the property free from the lease, saved the rights of infants in remainder; and it was held that on neither ground could the bill be sustained. Lord *Eldon* said: "If the bill stated a judgment by fraud, that was one thing; but he never heard before of a judgment impeached in equity for irregularity, without any attempt

to set it aside at law. \* \* \* It is difficult to say how equity could interfere at all. If their right accrued on the death of their mother, and if there was no bar, how was it that they had no right of ejectment at law ?” Lord *Redesdale* said : “ It had been objected that there had been irregularity in the proceedings in the ejectment ; but that was not for equity but for the Court King’s Bench to consider. \* \* \*

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There was nothing here to warrant the plaintiff to proceed in equity in any way. The proceedings, if any were competent, must be at law. They did not state that they wanted any necessary instrument ; there was no affidavit to the bill of any such being lost ; and it even appeared by their own shewing, that they had evidence to proceed by ejectment if they had so chosen.”

The judgment was thus on the express ground that the plaintiffs had a remedy at law, and that there was no occasion for their coming into equity. What the plaintiffs in the present case contended is, that they have no remedy at law ; that not being parties to the suit, they can make no motion therein ; and that having now the title to the land, they must have the right in some court to set up facts which show that the defendants are not entitled to deprive them of their property. It is manifest that *Baker v. Morgans* contains nothing against this view.

Judgment.

Assuming that there is no sufficient reason why the plaintiffs should not be at liberty to sustain their title against the irregular writs, I could only refuse them relief on its being shewn to be clear that the plaintiffs have a remedy at law ; and this has not been shewn.

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Declare that the lands conveyed to plaintiff are not bound by the executions of the defendants now in the Sheriff’s hands : Injunction against selling the lands under these or any other executions on their judgment. Defendants to pay plaintiff’s costs.

Decree.

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## DENISON V. DENISON.

*Undue influence—Excessive price of land.*

A younger son who was entitled to a large estate, under the will of his father, shortly after coming of age purchased from a step-brother—twenty years his senior, and who was in greatly embarrassed circumstances,—the equity of redemption in fifty acres of land, the mortgages on which he was to pay off out of the purchase money. Shortly afterwards the purchaser left this country for the United States of America, where he resided for some years, during which time the mortgagees had foreclosed the equity of redemption on default of payment.

The purchaser, having returned, filed a bill impeaching the transaction on the grounds of undue influence on the part of the vendor and excess in price. On the hearing the evidence failed to establish the fact of undue influence, and the evidence as to value being contradictory, the bill was dismissed with costs.

This cause came on to be heard before Vice-Chancellor *Spragge*, at the sittings of the Court in Toronto, in the spring of 1866.

The facts are fully stated in the judgment.

Mr. *Strong*, Q. C., and Mr. *Donovan*, for plaintiff.

Mr. *Blake*, Q. C., Mr. *E. Crombie*, and Mr. *Lawder*, for the defendants.

**Judgment.** SPRAGGE, V. C.—The transaction which is brought into question in this suit took place in the autumn of 1862. The exact date of the commencement of negotiations between the parties is not shown, but I take it to have been somewhere between the 1st and 10th of November. The plaintiff is the half-brother of the principal defendant, *Robert B. Denison*, and had come of age in the previous August. Under his father's will he was intitled to very considerable property, the estimated value of what he was entitled to as devisee and legatee, was from thirty to forty thousand dollars, and his share of the residuary estate was estimated at about the same sum. His father had died in 1853.

The defendant *Robert*, is spoken of as about twenty years older than the plaintiff. At the time of the transaction in question he was in very embarrassed circumstances.

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The transaction was the sale by *Robert* to the plaintiff of fifty acres of land near the city of Toronto, some thirty-four acres of it being on an elevated piece of land called the Ridge, and the rest of it below the Ridge; the Davenport road running along the foot of the Ridge. The land was at the time subject to a mortgage for \$4,000, made by one *Shaw*, a former owner, to the Canada Agency Association, upon which there was an arrear of interest; and for the foreclosure of which a Bill had been filed, and also to a mortgage to one *Williams* for \$400. A conveyance of the land from *Robert* and his wife (the latter to bar her dower) is produced, bearing date 22nd November, 1862; but the evidence shows that it was not executed till some time after the date, till late in December, if not in January. It is not quite certain whether there was any previous written contract of purchase. The plaintiff stated to one of the witnesses that there was; but none is produced, and there is no other evidence of its existence. The price was £50—two hundred dollars—an acre.

Judgment.

The transaction is impeached on two leading grounds: the one, that the conveyance does not truly express the real agreement between the parties; the other, that the bargain was an improvident one on the part of plaintiff; that the price was excessive, and that the bargain was brought about by undue influence on the part of *Robert* and by surprise.

The conveyance, after reciting the two mortgages to which I have referred, reciting also a mortgage by *Shaw* to *Robert B. Denison* and the conveyance of the equity of redemption by *Shaw* to *Denison*, states the consideration at \$10,000. Whether this could be construed as

1867. meaning that sum beyond the mortgages, making the whole consideration \$14,400, it is not necessary to determine—no such claim was ever made by *Robert*—and it is clear from the evidence that \$10,000 was the whole purchase money. But the point was made, and it was the leading allegation of the bill as originally framed, that these mortgages were to be met and provided for by the vendor; the plaintiff paying the purchase money as moneys should come to his hands from his father's estate, less \$400 which was paid in hand.

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There is some evidence certainly that the source from which the purchase money was expected to be paid was the father's estate. But then it was expected that the estate would furnish ample means for that purpose, and Mr. *Coates*, a connection of the family, and intimately acquainted with its affairs, says:—"It was understood and arranged that the father's estate would be wound up when *Charles* came of age." *Charles*, the plaintiff was the youngest, and the father had died in 1853. *Charles* had an income from rental of about \$1000 a year, besides his great expectations; while *Robert* was necessitous and pressed with debts. In the March following the conveyance, the plaintiff gave *Robert* an order upon the executors of his father's estate for a sum arrived at by his being charged with the mortgages. The circumstances as well as the terms of the conveyance are all against the plaintiff's contention in this respect, and the evidence in its favor is loose and unsatisfactory. I do not see any reason to doubt that it was the plaintiff and not *Robert* who was to provide for the mortgages.

In considering the second ground, it is proper to take into account not only the relative position of these two parties, but also of the other members of the family. The defendant *Robert* is the youngest of three brothers, of whom *Richard* is the eldest, and *George* the second. The plaintiff is a half brother by the same father, and

there was also a sister—a full sister of the plaintiff—who was married in the summer of 1862 to a Mr. *Sinms*, a professional man; and Mr. *Coates* had married a sister of the three elder brothers, and his sister was the widow of the father. All are living in the city of Toronto, and the plaintiff was on terms of intimacy with all of them. *George Taylor Denison*, the second son of the testator, was, with two other gentlemen, an executor of his will.

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There was no fiduciary relation between the parties. I will quote some passages from the plaintiff's bill in which he states the grounds upon which he seeks relief in this court:—

“That your orator had no need whatever of the said land, and was seduced into the said purchase contrary to the advice of your orator's friends, by the persuasions of the said defendant, whose influence your orator was unable to resist, and by his representation that the payment of the said purchase money would not press upon your orator's then means—the said defendant being well aware that your orator had at the time no means of paying for the lands except out of his said legacy, and your orator abandoned himself completely to the guidance of the said defendant in the premises, on account of your orator's natural love and reverence for the said defendant as his elder brother and adviser. \* \*

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That the lands sold by the said defendant to your orator were sold at a price grossly in excess of their intrinsic value, such value not being half the sum of \$10,000; but your orator, as the said defendant well knew, was greatly inexperienced in such matters at the time, and ignorant of the nature and extent of the obligations he was entering into, and had no knowledge of the value of the said lands other than such as he derived from the said defendant; your orator having then only recently, to wit, in the month of August, 1862, attained the age of twenty-one; but the said defendant, by reason of his great influence with your orator as his elder brother,

1867. and by his exaggerated estimate of the value of the said lands and other uncandid means, surprised your orator in the said purchase.”

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In another passage the plaintiff speaks of not having “any adviser” or assistance on the occasion of entering into the said purchase.

The Bill proceeds upon this great influence possessed by *Robert* over the plaintiff, resulting from family relationship, from his age ; the habit of deference on the one side ;—the bill uses the strong term “reverence,” and of control on the other, an influence, as the bill puts it, which the plaintiff was unable to resist ; so that there was no equality between them when they came to make a bargain or rather when it was the will of the elder that the younger should do so. I will state shortly how far this appears to be borne out by the evidence before discussing the merits of the bargain itself.

Judgment. The witnesses for the plaintiff upon this head, are Mr. *Coates* and Mr. *Simms*, and they go no further than this, that they think the plaintiff might be easily “coaxed” by the defendant *Robert*; and that he was inexperienced in the buying and selling of land, while *Robert* had had a good deal of experience.

They do not attribute to the plaintiff any weakness of intellect or pliability of disposition, nor to *Robert* any intellectual superiority over the plaintiff. *Coates* says in his evidence he thinks *Robert* could persuade *Charles* more than the other brothers could. The eldest brother *Richard*, to whose evidence I attach great weight, says, “I think he (*Charles*) was competent to make a bargain for the land, that is as competent as most young persons of his age. I am not aware that *Charles* was in the habit of consulting *Robert*. I do not think from his disposition that *Robert* could influence him much ; I know I could not ; he would often consult me and afterwards

take his own course contrary to advice I have given him. *Charles* was with me a great deal before he came of age. He was a great deal at my farm, working for a year or two before, and up to the time of making the purchase in question." He adds "*Charles* was not a very competent judge of the value of land, when he made the purchase. I do not think any young man of that age competent to deal in lands." Upon the same point the next eldest brother, *George*, says: "*Charles* was given a good deal to trading and trafficking. I thought him rather keen at making a bargain; was always about the same as other children, and ought to have known something about the value of land—I think, more than some of the witnesses who have been examined here, as to value. *Charles*, like other young men, was liable to be influenced by others; but I do not think he would be likely to be influenced by *Robert*, since he came of age. I do not think he was likely to consult any of his brothers. \* \* I think he was as keen at a bargain as *Robert*; he was given a good deal to buying and selling horses, and such like; and in that sort of traffic his skill chiefly consisted." The son of the last witness, a professional man, who had acted for the plaintiff in matters of business, says: "I think *Charles* and *Robert B. Denison* were about equal as to capacity to make a bargain. *Charles* has not made many good bargains, or managed his property well; still I think, taking all together, they were about on an equality at the time of the bargain;" and Mr. *Shaw*, an old friend of the family, gives this testimony: "I know *Charles* was in the habit of consulting his brother *Richard*; I do not think he would be likely to consult his brother *Robert*; *Charles* seemed sharp enough in business matters."

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I will add two facts bearing upon the same point; one—that before the plaintiff came of age the executors placed him in possession of a farm, part of the property devised to him; the other, that almost immediately after he came of age, and before the purchase

1867. in question, he made a purchase from the executors and trustees of a portion of his father's estate, which lay contiguous to land devised to him; the purchase money for this was \$900.

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Judgment.

Mr. *Coates* and Mr. *Simms* represent that *Robert* pressed upon the plaintiff the purchase of the land in question with a great deal of pertinacity, and what they say is, I believe, in the main true, though coloured somewhat by the evident bias which they evinced against *Robert*. There is, however, I may remark, a singular difference between the allegations upon this head in the original bill, for which, it is to be observed, instructions emanated from Mr. *Simms* himself, and the amended bill. As originally framed the bill stated that *Robert* being desirous of selling the land in question, and the plaintiff "being minded to purchase the same," the agreement between them was entered into. In the amended bill for the words "your orator being minded to purchase the same" is substituted; the allegation, that *Robert* "prevailed upon your orator by his influence, entreaties and representations, to become the purchaser thereof, and accordingly about the said month of November, A. D., 1862, your orator, overborne by the authority and influence of the said defendant over him, entered into an agreement," etc.

The evidence leads me to the conclusion that entreaty and importunity more than anything else, were used by *Robert* to induce the plaintiff to make the purchase; his principal arguments were his own pressing necessities, which would be relieved by the plaintiff making the purchase, that the property was well situated and valuable, and that the purchase would be a good one for the plaintiff, and that it would be a pity that the property should not be retained in the family. How far these considerations influenced the purchase is another question, which I will come to presently.

The ground of surprise is entirely unsupported by

evidence. *Robert's* proposition was met by disinclination to purchase on the part of the plaintiff, and by reasons why he should not purchase ; he did not want the land, the price was too high, and he had no present means to meet the purchase money. *Robert's* proposition was the subject of frequent conversations in the household where the plaintiff resided, and with Mr. *Simms* and Mr. *Coates*, all of whom advised against it. He went out to the place and personally inspected it. *Robert* suggested to him to consult his brothers, as one of the witnesses says ; *Richard*, only as the other says ; he did consult both, and both advised him that it would not be judicious in him to make the purchase. The inference that the plaintiff desires us to draw from all this is, that the influence of *Robert* was very great, so great as to overbear all this disinclination and opposition, and to compel him in spite of his better judgment and the advice of relations and friends to make the purchase that *Robert* wished him to make. I do not think that this is a necessary or a just inference. There is nothing in the character or position of the two men to make it even probable, and the deliberation with which the bargain was entered into and carried out (to which I have already adverted), is against it. I should say, therefore, it ought to be rejected, even if we had no light thrown upon the plaintiff's real motives for making the purchase. But we have some light thrown upon his motives, from which it appears that neither the influence of *Robert*, nor compassion on the plaintiff's part for *Robert's* necessities and a desire to remove them, were the influencing motives for the purchase. In a conversation about the purchase with a Mr. *Scarlett*, an intimate friend of the family from his childhood, Mr. *Scarlett* made the remark that had been made by others, that he thought the plaintiff had property enough ; to this the plaintiff answered that he had not any property suitable for building, and that he wished to build upon this. He seems also to have thought that he could make a profit out of it. Mr. *Shaw* says :—" After the

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1867. bargain was concluded he (*Charles*) told me he thought he would make a good thing out of it, that he was in treaty for selling the hill part for enough to leave him the flats clear." He adds, "*Charles* did not tell me he bought the land to assist *Robert*." *George*, the plaintiff's brother says: "When *Charles* told me he had purchased the fifty acres he stated that Mr. *Ross* had offered, or was willing to give £100 an acre for ten or twelve acres on the hill. I advised him by all means to let him have the land; but he said he thought it was worth more, or that he could get more for it. I thought *Charles* bought the land in order to make money out of it."

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Judgment.

The son of the last witness says: "One day he (*Charles*) told me he had some letter from, or communication with, Mr. *Ross* in respect of this land, in which he had been offered a larger price than he had paid, for a portion of the fifty acres; but his idea seemed to be that he would get more." This idea of selling at a profit to Mr. *Ross* may have been only after the purchase; still, *George*, his brother, may have been right in his conclusion that the plaintiff bought the land in order to make money out of it. His declared object to Mr. *Scarlett* was, that he purchased for a building site—and it may well be, that he combined both objects, a sale of a portion at a profit, and keeping the rest for building purposes. Fifty acres was probably sufficient for both.

It is worthy of remark, that in his conversation with various persons in relation to his purchase, he does not appear to have said anything about being over-persuaded by *Robert*, or being influenced by any motives, other than such as influence any ordinary purchaser; and even when consulting *Robert* the son (when he found the bargain becoming a burthensome one) with a view to getting out of it he does not seem to have complained of being over-persuaded, or influenced by *Robert*, or

surprised into, or in any way induced to make, a bargain, contrary to his own deliberate judgment.

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Before coming to the law of the case, I will refer shortly to the evidence of value. The land in question is of a peculiar character, of small intrinsic value, and in fact depending almost entirely for its value upon the prosperity of Toronto; upon its possessing a class of people of sufficient means to have villa residences and grounds out of town. With a large demand by people of that class, it would be difficult to say how large the selling price of land on the Ridge might not become. We find that, at one time, some years before the transaction in question, the former owner of this land was offered £150 an acre for the whole 100 acres, which he then possessed: such a price had got to be quite out of the question in 1862; and the position of land on the Ridge at that time was in substance, this: that the demand for it had almost entirely ceased; at a forced sale a very small sum only would probably be obtained; but the holders of land would not sell at the prices that could then be obtained. They held the land in the hope of a return of more prosperous times, and better prices, and what is a very material fact, some few sales have been effected at prices not differing materially from the prices given in this case. There are indeed, witnesses who give it as their opinion, that the land in question was not worth more in 1862, than a third, or even a fourth of what was the price between these parties, but what they say is matter of opinion; taking the land at its value for farming purposes, or at what in a period of depression could be obtained for it, if forced upon the market; they give no instances of actual sales at any such prices as they suggest as the value; the instances of actual sales are all the other way. I dare say, it may be truly said, that Mr. *Robert Denison* could not reckon with any degree of certainty upon obtaining, if his necessities compelled him to sell even one half of the price at which he sold to the plain- Judgment.

1867. tiff; and yet, on the other hand, if Mr. *Ross* or any person wishing to purchase the land as a building site, had asked him to sell, it could not be said that the price at which he sold to the plaintiff was an exorbitant price. It was not like farm land, with something of a recognized market value (though even as to that we knew how widely people will differ in their estimate), but it had a value so dependent upon circumstances and contingencies, that it is difficult to say that any price at all within reason was an exorbitant price.

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Judgment.

I have no reason to suppose that *Charles* made his purchase blindly or recklessly, or that he did not consider whether the price was too high; those whom he consulted at home thought it was so. He asked his brother *Richard* what it was worth, and *Richard* says: "I thought it well worth £50 an acre, and told him so." He explains that he meant with the purchase money payable, part down and part on credit. *George* the elder brother, spoke at the value of £30 an acre; but admitted that if he owned it, he would, if free from difficulty and the land unincumbered, expect £50 an acre for it.

Now, it is manifest that in this case there are absent most of the considerations upon which Courts of Equity proceed in setting aside transactions as against good conscience, or on grounds of public policy.

There is no fiduciary relation, no surprise, no misrepresentation, no concealment of any material fact. The plaintiff had precisely the same means of forming a judgment as to the land and its value, and as to its being desirable or undesirable for him to purchase as the seller had.

We have not in this case, as in many others, on the one side weakness of intellect, a facility of disposition,

the absence of self-reliance, the leaning of a weaker upon a stronger mind and will ; on the other, great mental superiority, and vigour, and strength of will, and the employing of all these to overcome the weaker, and to subdue it to the will of the stronger. We should expect all this from the case made by the amended bill, and to find it proved that the plaintiff was over-matched in all the qualities which go to the making of an advantageous bargain.

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I have referred to the evidence which had been given as to the character and habits of intercourse of the two men. The seller had the advantage that age and experience give, and of the ascendancy which is often acquired by an elder brother. In age there was a difference of about twenty years ; one was a man of thirty, while the other was a child of ten. Their relative position and age were such as to make influence and ascendancy very probable on the part of the elder. But as the younger grew up to man's estate, the difference between them would become less and less ; still, a considerable degree of influence might remain, and it is the duty of the Court to look with careful scrutiny at the dealings between parties so situated.

Judgment.

But looking at this case as I think it ought to be looked at, very carefully, even jealously, I cannot see that the parties dealing were upon unequal terms. The plaintiff had a turn for buying and selling, and had been in the habit of buying and selling horses, cattle, waggons, and the like. This sharpens the faculties, and probably also whets the appetite for dealing. He had been brought up in a family possessed of a large quantity of real estate, and where land and its value would probably be discussed. He is described as of average mental capacity ; as too fond of pleasure, but still not easily led ; and of being in the habit of consulting with others, rather in order to assist his own judgment, than to follow advice. It is not said that *Robert* had

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any mental superiority over the plaintiff; he was, like him, of no profession, though at one time intended for a surveyor.

It is not the case of a raw, inexperienced, simple-minded, confiding youth, having no judgment or will of his own, dealing with, and being controlled by, a strong-minded, skillful, astute man. In truth, there appears to have been but little disparity between them. A close intimacy and the difference of age is shown, but nothing in the character or capacity of *Robert* to make him an overmatch for the plaintiff.

Then as to the dealing itself; the bargain does not appear to have been brought about by any means that can be called unconscientious.

Judgment.

It is to be regretted, I think, that *Robert* was so importunate in urging the purchase upon the plaintiff; and it is possible that a desire to relieve *Robert* from his difficulties may have had some influence with the plaintiff; but the evidence does not lead me to think that he would have made the purchase unless he thought it for other reasons to his own advantage. I do not think he was blinded by his sympathy for his brother's position to make a purchase, which, otherwise he would have refused; though, on the other hand, I do not see that he took advantage of his brother's necessities to drive a hard bargain. But assuming that he did yield to his brother's importunities, and made a purchase to relieve his brother, which otherwise he would not have made, still, if he did it with his eyes open, as I have no doubt he did, he being influenced by such motives could form no ground for setting it aside.

I have examined the cases which have been cited, and some others. None of them are authority for setting aside a transaction under such circumstances, as in the case before me. In all of them there was a fiduciary

relation either existing or with the influence of such a relation, assumed by the Court to be still existing; or surprise, or the absence of independent advice, or a habit of control on the one side, and of submission on the other, that convinced the Court that no judgment or will had been exercised by the party asking relief; or the relative position of the parties was such as to satisfy the Court that there was a gross inequality between them in treating upon a bargain, and that an unconscientious advantage had been taken of the weakness and ignorance of the parties seeking relief. In the important case of *Clark v. Hawke*, (a) before my brother *Mowat*, there was a concurrence of several of these grounds of relief.

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Denison.

There is a very important case in which relief was refused, *Harrison v. Guest* (b). A man upwards of seventy years of age, and in a very infirm state of health, had certain property worth £600 or £700 subject to a mortgage for £300. Mr. *Guest*, the defendant, had applied to the old man to sell him the land, but he had refused; about six months before his death, however, he sold the place to Mr. *Guest*; the consideration being a lodging in a place belonging to Mr. *Guest*, and attendance and maintenance from Mr. *Guest's* table. The proposition to sell upon these terms seems to have come from the old man, and he appears to have cared for nothing more than such an arrangement as would be most for his own comfort during the short remainder of his life. Mr. *Guest* advised him to take time to consider the matter, which he did; he also suggested to him to have professional advice, which he declined; and the bargain was completed without the old man having any independent advice whatever. Lord *Cranworth*, before whom the case came upon appeal thought the consideration very inadequate, but held that there being no fiduciary relation between the parties, it was not necessary to shew

Judgment.

(a) 11 Gr. 527.

(b) 6 D. M. & G. 424.

1867. adequacy of consideration, and refused to disturb the transaction, The case was appealed to the House of Lords (a), Lord *Campbell* having become Chancellor, and the judgment of Lord *Cranworth* was affirmed unanimously by Lords *Campbell*, *Brougham*, and *Wensleydale*; Lord *Cranworth* being also present and joining in the judgment of the other Lords. Here was a dealing between an aged and very infirm man of humble condition, as appears by the case, and a gentleman of property and education, and in full vigour, mentally and bodily. There was great inequality between them as parties dealing for a bargain. The case therefore decides that inequality in the parties dealing, and inadequacy, are not of themselves sufficient to invalidate a transaction.

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Denison.

Judgment. I apprehend that inequality and an unconscientious use of it, by the party having the superiority, would be sufficient. In *Harrison v. Guest*, Mr. *Guest* must have known that the consideration was inadequate, but the seller named his own terms, selfishly and whimsically, as it would appear, but still he knew what he was about; and the Court and the House of Lords thought there was nothing unconscientious in Mr. *Guest* purchasing for such a consideration, although very inadequate. Now the case before me is not so strong as to inadequacy, for I have no reason to doubt that *Robert Denison* conscientiously believed the land to be worth the price at which he sold it.

I should be prepared, therefore, to dismiss the plaintiff's bill, even if there were nothing else in the case; but there are other circumstances which are against the plaintiff. The order given by the plaintiff to *Robert Denison* upon his father's executors in March, 1863, was a deliberate affirmance of the transaction.

There is another point which, is, to my mind, a very

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(a) 8 H. L. Ca. 481.

important one. It appears from evidence which I have already quoted, that the plaintiff expected to sell the land, or a portion of it, at a great profit. This fell through and afterwards he comes to this court for relief. The remarks of Lord Romilly in *Grosvenor v. Sherratt*, (a) are apposite to this. In that case a young lady granted a lease of a mine under circumstances which made a very strong case for relief, which was decreed after there had been considerable delay in filing the bill. Lord Romilly's observation was this: "With respect to what was said regarding the delay, I have been watching carefully for any evidence to show that this mine had turned out a valuable one, and that the attempt was made to set aside the lease after the value had been discovered. That is what the Court would not allow to be done. A person is not at liberty to watch the effect of working a mine to see what the result may be, and then seek to set aside a lease of it if it turns out valuable."

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Judgment.

Another great difficulty in the plaintiff's way is, that the land in question is not in a position to be restored to *Robert Denison*; and if that has occurred through the act or default of the plaintiff, he has, I apprehend, disentitled himself to relief, however clear his title to relief might be otherwise. This obviously must be so; and it was so held in the case of the *Great Luxembourg Railway Company v. Sir John Magnay* (b).

The case was this: the defendant, a director and president of the company, had assumed to purchase for and on behalf the Company of another railway in Belgium, for which he received from the company 500 shares of £5 each, he being in fact himself the concessionaire of this other railway, but concealing this fact from the company. The transaction was one upon which Lord Romilly felt clear that it could not stand; and if the company had been in a position to return the

(a) 28 Beav. 659.

(b) 25 Beav. 586.

1867. concession to the defendant he would have given them relief; and he intimated that without any act of their own, it had become impossible to return it; that their doing all that was possible for them to do to reinstate the defendant in his former position, they would be entitled to relief. What they did was this, they filed their bill, and strangely enough, afterwards sold the concession to one *Grainger*. The Master of the Rolls said the principle upon which the Court proceeded was to restore parties to the position in which they stood before the act complained of; and if a party complaining does, after knowledge of the facts out of which the plaintiff's equity arises, acts rendering this impossible, they place themselves in a position which disables the Court from reinstating the parties, and so disentitle themselves to relief. I give the substance of his Lordship's judgment, not the words. He felt himself obliged to refuse relief.

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Jndgment. What has occurred in the case before me is this: The plaintiff took no steps to impeach this transaction; but, in November, 1863, left Canada for the United States, and was absent until about Christmas of the following year; and the bill was filed on the 27th January, 1865. During his absence, the mortgagees—the Canada Agency Association—obtained a final order for foreclosure. It does not appear that the plaintiff ever intimated that he had any intention of questioning this transaction until after he had returned to Canada. While it was a subsisting transaction between the parties, it was the plaintiff's duty to meet the mortgage money, or the interest, or whatever was due upon it. It was on his default that the final order for foreclosure was obtained. It is suggested that the order cannot stand, inasmuch as the plaintiff was not made a party to the foreclosure proceeding, which had been commenced before his purchase; but he asked for a decree setting aside the conveyance to himself. It is quite clear that, after such decree obtained, *Robert Denison*, who was

served, would be entitled as of right to set aside the proceedings? I express no opinion, whether he could or not; but surley it lies upon the plaintiff to show that the property is still in a position to be restored to *Robert Denison*. If it is even uncertain, that, coupled with the long delay and the other circumstances to which I have adverted, would be sufficient to disentitle the plaintiff to relief, even if his case were a stronger one than it is.

1867.

The plaintiff's bill must be dismissed, with costs.

### PYPER V. CAMERON.

*Pleading—Multifariousness—Parties.*

To a bill by an execution creditor to set aside, as fraudulent against creditors, two distinct conveyances executed at different times to two separate grantees, the two transfers having no connexion with one another,—a demurrer for multifariousness was allowed.

To a bill by an execution creditor of two joint debtors to set aside conveyances by one of them, as fraudulent and void against creditors, the grantor was a defendant:

*Held*, that if the grantor was a necessary party, his co-debtor should be a party also.

This was a bill by *William Pyper* against *John Cameron*, *Alexander Cameron*, *Ewen Cameron*, and *George Archibald Pyper*, setting forth that in and prior to the year 1852, the defendant, *George Archibald Pyper*, carried on business in the City of Toronto as a wholesale merchant, and continued so to do up to the date of the assignment thereafter mentioned; that the defendant, *John Cameron*, carried on the business of country storekeeper, with *Donald Cameron*, his brother, as partners and joint traders, and as such partners dealt and traded with the said *George Archibald Pyper*, from the commencement of the year 1852 till about the end of the year 1857, when they dissolved such partnership, being at the time largely indebted to the said *George Archibald Pyper*; that on or about the 1st November,

tatement.

1867. 1868, the said *George Archibald Pyper* recovered a judgment in the Court of Queen's Bench, at Toronto, against the said *John Cameron* and *Donald Cameron*, for the sum of £960 1s. 8d., for a debt contracted by them for goods supplied by him to them as such co-partners and traders, and which judgment was duly registered in the County of Ontario; that execution against the goods and chattels of the said *John Cameron* and *Donald Cameron* was duly issued on the said judgment and placed in the hands of the Sheriff of the County of Ontario, but the same was returned by him *nulla bona*, and a writ of *fieri facias de terris* was duly issued on the said judgment, and placed in the hands of the said Sheriff, and the said writ now remains in the hands of the said Sheriff in full force, but that by reason of the facts thereafter stated, the Sheriff had been unable to execute the said writ, and the said judgment was unpaid and unsatisfied; that by Indenture dated 12th October, 1859, and made between the said *George Archibald Pyper* of the first part, and plaintiff of the second part, the said *George Archibald Pyper* granted assigned, and conveyed to the plaintiff all his real and personal estate, and all his books debts, claims, demands, and choses in action whatsoever both at law and in equity in trust for the benefit of his creditors; that the defendant *John Cameron*, who was the active and managing partner of the said firm, had, previous to the commencement of the said dealing between the said firm and the said *George Archibald Pyper*, inherited from his father, who died in the year 1850, a valuable improved farm in the Township of Thorah, of which the said *John Cameron* was seized and entitled, and represented himself to be seized and entitled during the course of the said dealings, and until after the recovery of the said judgment the said *George Archibald Pyper* supposed he still held the said property, and it was on the faith that the said defendant, *John Cameron* owned the said property and other lands in the bill mentioned, that the said *George Archibald Pyper* extended credit

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Judgment.

to the said firm ; that while the said firm were largely indebted to the said *George Archibald Pyper*, and their assets wholly insufficient to satisfy the claims against them of the said *George Archibald Pyper*, the said *John Cameron*, by an Indenture dated 13th August, 1853, and made between the said *John Cameron*, of the first part, his mother *Mary Cameron*, of the second part, and his brother *Alexander Cameron*, one of the defendants hereto, of the third part, in consideration of £100 therein expressed to have been paid, but which was not paid, conveyed, or pretended to convey the said farm to his said mother, now deceased, for life, and then to the said defendant, *Alexander Cameron*, in fee ; that the said pretended conveyances was not registered for upwards of one year after its date, for the purpose of deceiving the said *George Archibald Pyper*, and by preventing him from discovering that the said farm had been conveyed by the said *John Cameron*, of inducing him to continue to extend his credit to the said firm ; that the said farm was at the time of said conveyance worth at least £1,000, and the said conveyance thereof was voluntary and without consideration, and not *bona fide*, and was made and excuted by the said *John Cameron* and accepted by the said *Mary Cameron*, and *Alexander Cameron*, with the intent, design or purpose of delaying, hindering, deceiving or defrauding his creditors, and to protect the said property from the then existing and future debts of the said *John Cameron*, or of the said partnership, and your complainant charges that the said conveyance is fraudulent and void, and ought to be set aside ; that the said defendant *John Cameron*, became the purchaser of 200 acres in the Township of Mara, from the Crown, and paid the greater part of the instalments of the purchase money thereon during the time of the dealings between the said firm and the said *George Archibald Pyper*, and when the said firm were largely indebted to the said *George Archibald Pyper* : that while indebted to the said *George Archibald Pyper*, in the amount of the said

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1867. judgment, and to various other persons and firms in large sums of money, and after proceedings at law had been commenced against him by certain of the creditors of the said firm, and while he was wholly insolvent, he the said defendant, *John Cameron*, by assignment dated 26th April, 1858, assigned, or attempted to assign and convey the said lot in Mara, or his interest therein, to his brother, *Ewen Cameron*, one of the defendants hereto : that the said lot in Mara was worth upwards of £750, and that the said assignment purported to be made in consideration of £250, but that no consideration of any kind was given therefor by the said *Ewen Cameron*, and the plaintiff charged that the said assignment was voluntary and not *bona fide*, and was made and executed by the said *John Cameron*, and accepted by the said *Ewen Cameron* with the intent, design, or purpose of delaying, hindering, deceiving, or defrauding his creditors, and to protect the said property from the then existing and future debts of the said *John Cameron*, or of the said partnership, and plaintiff also charged, that the said assignment was fraudulent and void, and ought to be set aside ; that the whole assets of the said partnership, and of the said *Donald Cameron* and *John Cameron*, had been exhausted by and were insufficient to pay the other creditors, and that neither the said *John Cameron*, nor *Donald Cameron*, had any property which the plaintiff could make available at law towards the satisfaction of his said judgment, except the said lands, and prayed that the several conveyances might be declared fraudulent and void as against the said judgment.

Statement.

To this bill the defendants *Alexander Cameron* and *Ewen Cameron*, filed a demurrer on the following grounds :—(1st) That *Donald Cameron* was a necessary party ; (2nd) that the case stated by bill was not such as entitled plaintiff to relief in equity ; (3rd) that the bill was for several and distinct matters in some of which the demurring defendants had no interest ;

and (4th) that the allegations and statements in the bill were uncertain, indefinite and insufficient. 1867.

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Mr. *Fitzgerald*, for demurrer, cited *Loucks v. Loucks* (a); *Drewry's* Eq. pl. 42; *Lewis' Eq.* 112, 113, 185, 116; *Commercial Bank v. Cooke* (b).

Mr. *Rae*, contra, referred to *Collyer on Partnership*, 733; *Mayor of London v. Levy* (c) *Baker v. Mellish* (d).

MOWAT, V. C.—This was a demurrer by two of the defendants, *Alexander Cameron* and *Erwen Cameron*.

The plaintiff is assignee of a judgment recovered against *John Cameron* and *Donald Cameron*, partners in trade, on which, after an execution against goods had been returned *nulla bona*, a writ against lands was issued and placed in the hands of the Sheriff; and the object of the bill is to set aside a conveyance bearing date 13th August, 1853, whereby *John Cameron* conveyed certain property to his mother, now deceased, for life, with remainder to the defendant *Alexander Cameron*, in fee; and another conveyance bearing date 26th April, 1858, of other property, to the defendant *Erwen Cameron*. The plaintiff charges that both conveyances were voluntary and fraudulent against the grantor's creditors.

Judgment.

The demurring defendants insist that, the two impeached transactions being in all respects distinct and unconnected with one another, so far as appears by the bill, and the grantee in the one deed having no common interest with the grantee in the other, the bill is multifarious. This objection is good.

It was also contended that the bill was open to some objections of form.

(a) 12 Gr. 343.

(c) 8 Ves. 403.

(b) 9 Gr. 524.

(d) 11 Ves. 68.

1867. I expressed at the close of the argument, my opinion on these grounds of demurrer.

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The bill is also demurred to because the co-debtor, *Donald Cameron*, is not a party. No English case on this point was cited.

I think that *Donald Cameron* is a necessary party if his partner, the grantor, is a necessary party; and the plaintiff has made the latter a party.

The bill does not positively allege that *Donald Cameron* has effectually parted with the property; but only that he has conveyed, or *pretended* to convey, the same; and it is charged that the conveyances were voluntary and without consideration, and not *bona fide* and were made and executed with the intent, design or purpose of delaying, hindering, deceiving or defrauding his creditors, and *to protect the property from his debts*.

Judgment

If the conveyances were not effectual to pass the property as between the parties to them, the grantor seems a necessary party to the suit; and if the bill does not clearly shew that he has no interest, the same result follows, when the question arises on demurrer.

Two cases were referred to,—one said to be a decision by the late Vice-Chancellor *Esten* in favor of the objection; and the other, by my brother *Spragge*, which was said to be against it. I have not been able to find the former case. The latter case (a), on examination, does not appear to apply. It was there held that the debtor who made the fraudulent conveyance was an unnecessary party, but the objection was taken at the hearing and not by demurrer; the conveyance appeared to have been designed to pass the property; and if it did not, the grantor was an insolvent under the Act, and his assignees were parties to the suit.

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(a) *Commercial Bank v. Cook*, 9 Gr. 524.

On the whole, I think this ground of demurrer must be allowed. 1867.

Demurrer allowed with costs. Plaintiff to have leave to amend.

### PEGG V. EASTMAN.

*Fraudulent Conveyance—Costs between solicitor and client—Indigent debtor's act—Collateral issue.*

A person having a claim against a party in insolvent circumstances made a present of it to his sister, the wife of the insolvent, in order that she might thereby obtain from her husband a deed of his property in consideration of such debt, which she did through the intervention of a third party who conveyed the land to her. The court set aside the conveyance at the instance of a creditor of the husband as void under the Statute 13th Elizabeth, and the Indigent Debtor's Act of this Province.

In a suit to declare conveyances to a wife void as against creditors, it was alleged that the land had been conveyed by the father of the wife to the husband after executing his will, (whereby he devised the same property to his said daughter,) under pressure, and undue influence such as, if true, to render the deed liable to be impeached on those grounds; but the Court refused to try such issue in the present suit, as the creditors of the husband were entitled to make out of his title to the property at the time of the conveyance impeached what they could towards satisfaction of their claims.

Where a creditor filed a bill impeaching conveyances made by the debtor as fraudulent against creditors, and the relief prayed was granted at the hearing: the Court ordered the difference between party and party, and solicitor and client costs to be paid *pro rata* by such of the creditors as might avail themselves of the benefit of the suit, for the purpose of obtaining payment of their demands.

The bill in this cause was filed by *Joseph Pegg* against *Jonathan Eastman, Elizabeth Eastman* (his wife), *Samuel E. Phillips*, and *John Rogers*, setting forth that plaintiff had obtained judgment and issued execution thereon against defendant, *Jonathan Eastman*, which remained unsatisfied; that *Eastman*, with a view of defrauding plaintiff and others, creditors, had con-

Statement.

1867. veyed certain specified real estate to the defendant, *Phillips*, who conveyed the same to Mrs. *Eastman*, and prayed relief accordingly.

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It appeared that the defendant, *Rogers*, was the brother of Mrs. *Eastman*, and having or claiming to have a demand against her husband of \$2,900, or thereabouts, transferred such claim to his sister, Mrs. *Eastman*, and in consideration of such debt, she procured her husband to execute a conveyance of the premises in question to the defendant *Phillips*, who immediately thereafter conveyed the same to Mrs. *Eastman*.

The consideration for this conveyance from *Eastman* was impeached as merely colorable. It further appeared that *Isaac Rogers*, the father of Mrs. *Eastman*, had, by his will, devised this same property to Mrs. *Eastman*, but that some years after the execution of the will, the defendant, *Eastman*, had, as alleged and denied, by undue influence and fear of violence, prevailed on the said *Isaac Rogers* to execute an instrument under which *Eastman* claimed the property.

Statement.

The cause came on for the examination of witnesses and hearing at the sittings of the Court at Toronto, in May, 1865, when, after the cause had been partially heard, it was adjourned over, and again came on in December, 1866.

Mr. *McMichael* and Mr. *Hayes*, for plaintiff.

Mr. *James McLennan* for the defendants, other than the defendant *Rogers*, against whom the bill had been taken *pro confesso*.

*Goodman v. Grierson* (a), *Rogers v. Rogers* (b), *Heap v. Tonge* (c), *Pott v. Todhunter* (d), *Gale v.*

(a) 2 B. & B., 274  
(c) 9 Hare, 90.

(b) 2 Gr. 137.  
(d) 2 Coll., 76.

*Williamson (a)*, *Moor v. Rycault (b)*, *Middlecome v. Marlow (c)*, *Attwood v. Small (d)*, *Marshall v. Sladden (e)*, were referred to.

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VANKOUGHNET, C.—I am of opinion that the conveyances from *Eastman* to *Phillips*, and from *Phillips* to Mrs. *Eastman*, are void, both under the Statute of Elizabeth and the Act of this province, known as the Indigent Debtor's Act. It seems beyond doubt that *Eastman* was notoriously insolvent at the time of the execution of the conveyance by him. One judgment against him is proved, at the suit of *Jacques*, but his debts were numerous. The alleged consideration for the deed is a debt from *Eastman* to *Rogers*, of \$3000, which *Rogers* himself considered worthless, and which he was willing to make his sister a present of, to enable her to obtain a deed of the property to herself through the intervention of *Phillips*. She, as to the consideration, could not stand in a better position than *Rogers*, and he could not hold the land in satisfaction of the debt, as it would have been an undue preference to him. But she stands, I think, in a worse position than *Rogers* would have done had the transaction been a simple payment to him of his debt by the transfer of the land, for it seems to me that the use or application or appropriation of this alleged debt was a mere contrivance to enable the wife to obtain the land and hold it free from her husband's debts. It is more than doubtful if *Eastman* owed *Rogers* any such sum as \$3000. No satisfactory account of it is given, *Eastman* cannot explain it except on the hypothesis that a loan of £50 at compound interest would, in the lapse of years, swell up to £750. *Rogers's* account of it is but little better. I am satisfied that the object of all parties at the time, was to save the land, if they could, from

Judgment.

(a) 8 M. & W., 405.

(b) Prec. Ch. 22.

(c) 2 Atk. 518.

(d) 6 Clk. & F. 532.

(e) 7 Hare 428.

1867. *Eastman's* creditors, and I must therefore hold that the conveyances from *Eastman* and *Phillips*, are fraudulent and void as against the creditors of the former.

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Mr. *McLennan*, the learned counsel for the defendants, scarcely attempted to support these deeds, but in a very able argument, contended that *Eastman* had no estate in the land—or at most a questionable title; that the property was really his wife's under a devise by her father, from whom in extreme old age, *Eastman* had, by threats, coercion, and undue influence, obtained a conveyance of the property, and that the deed, therefore, to her through *Phillips*, was to be treated if not in condonation or reparation of this fraud, at least as a settlement of a long standing dispute between himself and his wife as to the ownership of the property: a family arrangement which ought not to be disturbed.

Judgment. There would be great weight in this position if the impeached transaction had taken place for any such purpose, and with any such object *bona fide*; but not only is there an absence of any evidence of this, but the attending circumstances appear to me to negative it, and to lead to the conclusion at which I have already arrived.

Still, even so, Mr. *McLennan* contends that I must, in this case, decide as between Mr. and Mrs. *Eastman* whether or not the deed to him from her father is valid; and that, if upon the whole evidence I think it not, I must dismiss the bill, as there would then be nothing for the creditors of *Eastman* to take. I think I should not try any such issue here, *Eastman* having dealt with the property as owner. As owner, for an alleged valuable consideration of \$3000, conveyed it to *Phillips*. I think his creditors are entitled to make out of his title to it at the time of this conveyance what they can, and that I am not called upon here to try an independent issue which may never arise, or be prosecuted hereafter, should the property be sold for his debts.

Subsequently the Chancellor, on the authority of the case of *Goldsmith v. Russell* (a), directed the decree to be drawn up, ordering the difference of the plaintiff's costs, as between party and party, and solicitor and client to be contributed *pro rata* by such of the creditors of *Eastman* as should avail themselves of the benefit of this suit, for the purpose of obtaining payment of their claims. 1867.

### DUDLEY V. BERCZY.

#### *Mortgage—Infants.*

Where the heirs of the mortgagor are infants, and a foreclosure suit is instituted, the rule of the Court is to grant a reference, as of course, to inquire whether a foreclosure or sale is more for the benefit of the infants.

But if affidavits are filed to satisfy the Court as to the proper decree, or if the guardian consents, the reference may be dispensed with.


This was a suit by a mortgagee, and came on for hearing by way of motion for decree.

Mr. *Blain*, for the plaintiff, asked for a foreclosure.

Mr. *Barrett* and Mr. *J. Smith*, for defendants, some of whom were infants, asked that an inquiry might be directed to ascertain whether a sale or purchase would be more beneficial for the infants.

Mr. *Blain* insisted that a mortgagee was entitled to a foreclosure without such reference.

MOWAT, V. C.—This is a suit for foreclosure, the mortgagor being dead, and some of his heirs being infants. On behalf of the infants a reference was asked as to whether a sale or foreclosure would be more for the Judgment.

1867.  infant's benefit; and on the part of the plaintiffs, it was insisted that such a reference could not be granted without the plaintiff's consent, and, it was said, that my brother *Spragge* had in a late case so held. I have not been able to find this case; the Chancellor has frequently held expressly that such a reference is of course, and did not require the plaintiff's consent; and I find that numerous decrees, not by consent, have been drawn up for several years, containing such a reference. Until the objection was taken in the present case, I had been under the impression that the settled practice of the Court on the point, was not open now to question (*a*). I think that if the rule is to be held otherwise, it must be by the full Court.

Dudley  
v.  
Berczy.

Judgment. Where the parties, including the guardian for the infants, are satisfied at the hearing, as to whether a decree for a foreclosure or sale would be more for the infant's advantage, and affidavits are filed to satisfy the Court upon the point, a reference may be dispensed with.

Such affidavit should shew the amount due on the mortgage, the value of the property, and any other facts necessary to form a judgment on the question.

In the present case, there will be the usual reference.

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(*a*) *Dickson v. Draper*, 11 Gr. 362; *Tr. & L. Co. v. McDonell*, 12 Gr. 196; *Siffken v. Davis*, Kay, App. 21.

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1867.

## RODGERS V. RODGERS.

*Chancery Sale—Surprise.*

One of the testator's sons bid at a Chancery Sale of his father's property, such bidding being by those present supposed to be for himself, but being in reality for another person, who had secretly employed the son to bid under the expectation that there would be less competition against the son than against a stranger, and the property was knocked down to the son, but the contract thereupon was signed by his principal, and it appeared that the effect of the son's bidding being supposed to be for himself, had been to deter others from bidding; the Court, holding this to be a surprise on other bidders and an unjust advantage to the purchaser, refused to enforce the purchase, and directed a re-sale at the risk and cost of the purchaser.

This was a suit for the execution of the trusts of the Statement.  
will of Peter Rodgers, deceased.

In pursuance of the decree pronounced in the cause, a sale of the property took place with the approbation of the Master, who, in reference thereto, reported that the same had been offered for sale by public auction according to his appointment, on the 3rd day of November last, by *Robert H. Booth*, auctioneer, and at such sale *Peter Rodgers* one of the defendants, was the highest bidder at the price or sum of \$2,700; but that *Thomas Y. Savage* was by the said auctioneer declared to be the highest bidder and the purchaser; that the said *Thomas Y. Savage* attended personally at the said sale, and might have bid openly, had he thought proper to do so; but that, in consequence of a collusive arrangement between the said *Peter Rodgers* and the said *Thomas Y. Savage* previous to the said sale, the said *Thomas Y. Savage* abstained from bidding, and the said *Peter Rodgers* bid without its being known, and without declaring, that he was bidding for the said *Thomas Y. Savage*; that, from the evidence before the Master it appeared that the effect of the said *Peter Rodgers'* bidding apparently for himself (he being a son of the testator whose property was being sold), was to damp the sale, and to prevent

1867. other parties from bidding, from an unwillingness to bid against one of the family of the testator; and by reason thereof, the Master found that the sale to the said *Thomas Y. Savage* ought not to be approved; and the Master, therefore, did not approve the same.

Rodgers  
v.  
Rodgers.

From this finding of the Master, the purchaser appealed, alleging :

1. That no intending purchaser was influenced or affected on account of *Peter Rodgers* bidding at such sale.

2. That the full value of the property was realized, and that no greater sum would have been realized had the appellant bid personally for said property instead of *Peter Rodgers*.

Statement. 3. That there was no collusive or fraudulent arrangement between *Peter Rodgers* and *Thomas Y. Savage*, in consequence of which the said *Savage* abstained from bidding at said sale.

4. That *Peter Rodgers* and *Thomas Y. Savage* were both competent to purchase or bid at the said sale, and that *Savage* was declared by the auctioneer, at said sale, to be the highest bidder and purchaser of said property, and was accepted as such, and as such purchaser, signed the contract of sale, and paid his deposit.

5. That from the evidence taken before said Master, the report should have approved the sale.

Mr. *J. H. Bull*, for the purchaser.

Mr. *Blain* for the plaintiff.

Mr. *D. B. Read*, Q. C., for the administrator.

Mr. *Hoskin* for infant defendants.

MOWAT, V. C.—This was an appeal from the Master's report, dated 21st January, 1867, whereby he found that the purchase by the appellant, *Thomas Y. Savage*, of the property directed by the decree, bearing date 28th August, 1866, to be sold, ought not to be approved.

1867.

Rodgers  
v.  
Rodgers.

The plaintiff's solicitor had the conduct of the sale; and, by the conditions of sale, all the parties except the plaintiff were at liberty to bid (*a*). The sale took place on the 3rd November, 1866, when the defendant *Peter Rodgers*, one of the devisees under the will, attended and bid, and after giving several bids, the property—a cleared farm, described by a witness as one of the most valuable in the township of Albion—was knocked down to him at \$2,700. The appellant, who was present during the whole time of the sale, then came forward and signed the contract as the purchaser at that bid.

I am satisfied that the circumstance of *Peter Rodgers*, Judgment.  
one of the children of the late owner, being a bidder, was calculated to diminish competition at the sale, and that the sale was in fact damped by it.

The auctioneer says in his deposition that, in the course of his experience as an auctioneer, he has invariably noticed that, when any member of the family of the owner of property, sold under any process of law, bids for the property, others attending the sale cease bidding against or competing with him. This observation is in conflict with nothing that is said by any other witness, but on the contrary is confirmed by other evidence. So much for the general effect of bidding by one in the situation of *Peter Rodgers*. Persons who attended this sale were produced, whose evidence shews that this was the actual effect here: that they refrained from bidding when they found

(a) G. O. of June, 1853, No. 36, Rule 9. Vide *Williams v. Attenborough*, T. & R. 76.

1867. *Peter Rodgers* was a bidder, being unwilling to interfere with his chance of acquiring his father's farm.

Rodgers  
v.  
Rodgers.

The appellant had had no acquaintance whatever with *Peter Rodgers* until the morning of the day of sale, and I have no doubt the object of employing him to attend the auction and bid, was to take advantage of the good feeling which in such cases diminishes competition. The property was worth more than \$2,700 ; but whether anybody would have offered more at the auction if *Peter Rodgers* had not bid, or had not been supposed to be bidding for himself, the evidence does not establish.

Can the appellant, under these circumstances, insist on his purchase ?

It was conceded, in the argument of the learned counsel for the appellant, that a purchase under a decree would not be enforced unless the Court would decree specific performance of a purchase made under like circumstances out of Court.

Judgment.

Now, in the case of sales of land out of Court otherwise than by auction, I understand the rule to be, that, if an intending purchaser, in order to obtain property at a reduced price, or for any like object, employs, to negotiate the purchase as principal, a person to whom he knows the owner, from feelings of personal regard, will sell the property for less than to others, and the Court is satisfied that the deception has operated to the prejudice of the seller—specific performance of the contract will not be enforced (*a*). The principle of this class of cases appears to apply to the present case.

The decision in *Twining v. Morrice* (*b*) points out

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(*a*) *Popham v. Eyre*, Lofft, 786 ; *Philips v. Duke of Buckingham*, 1 Vern. 227 ; *Bonnet v. Sadler*, 14 Ves. 527 ; *Fellowes v. Lord Gwydyr*, 1 Sim. 63 ; 1 R. & M. 89 ; Sug. V. & P. 219, 14th ed., ch. 5, s. 3, pl. 52.

(*b*) 2 B. C. C. 331.

another principle, having reference to auction sales, which also supports the contention of the respondents. That case was decided by Lord *Kenyon*, when Master of the Rolls,—of whom Lord *Eldon* (a), in reference to this very decision, says that he was a “Judge who understood the doctrine of courts of equity as well as any one.” There a person who had been solicitor for the vendor, and was known to have been so, bid as agent for the purchaser; and specific performance of the contract was refused, on the ground, as stated in the judgment, that on this account his bidding had ‘chilled the sale;’ that ‘the sale did not proceed with so much advantage as it otherwise would have done;’ that ‘by an inadvertent act, Mr. *Blake* (the agent) was in a situation which hurt the sale, and was put into that situation by Mr. *Twining*,’ the real purchaser.

1867.

Rodgers  
v.  
Rodgers.

That decision was afterwards referred to in several cases by Lord *Eldon*, who had been counsel for the purchaser. In Marquis *Townshend* v. *Stangroom* (b) his lordship spoke of the decision thus: “In that case it was impossible to impute fraud, mistake, or negligence, but Lord *Kenyon* was satisfied the agreement was obtained by surprise upon third persons; which therefore it was unconscientious to execute against the other party interested in the question. \* \* *Blake* being the common acquaintance of both parties, and having no purpose to bid for the vendor, unfortunately was employed to bid for the vendee; and others, knowing that he was generally employed for the vendor, thought the bidding was for him. Lord *Kenyon* thought that was such a surprise upon the transaction of the sale, that he would leave the parties to law; and yet it was impossible to say, that the vendee appointing his friend, without the least notion, much less intention, that the sale should be prejudiced, was fraud, surprise, or anything

Judgment.

(a) *Mortlock* v. *Buller*, 10 Ves. 313.

(b) 6 Ves. 328

1867. that could be characterised as morally wrong." The

Rodgers  
v.  
Rodgers.

Lord Chancellor had again occasion in *Mortlock v. Bul-ler* (a) to explain what he understood the case to have decided : "The only ground there was, that *Blake*, who purchased for *Twining*, having been the solicitor for the vendors, Lord *Kenyon* was satisfied his bidding had damped and chilled the sale ; creating the suspicion that he was a puffer ; and, though there was no evidence that the estate would have brought more, he thought that circumstance a very sufficient ground for refusing a specific performance." \* \* "That case was free from all imputation upon the party. It was no more than that the vendors had employed *Blake* as their solicitor. When the estate had been brought to sale, he was in no sense their agent. They had never suggested to him, nor had he undertaken, to bid for them. The plaintiff, going into the room, bid *Blake*, as a friend and neighbor, to bid for him. Lord *Kenyon* said, as his bidding might appear to the persons present a bidding for the vendors, and as that might damp the sale, that formed such an impediment to a specific performance, that the party should be left to law. I give no opinion upon that case, but it is infinitely short of this," &c. (b)

Judgment.

Lord *Eldon* was inclined to think that the case had gone too far, the purchaser and agent having both acted in good faith and with no purpose of damping the sale. But here, I am satisfied that was the very object for which *Peter Rodgers* was desired by the appellant to bid. With the qualification which that circumstance supplies, *Twining v. Morrice*, which has been frequently quoted as an authority, appears sufficient to show that the appellant cannot insist on retaining the advantage which he has derived from employing one of the testator's sons to bid for him, and concealing the agency from other bidders until the property had been knocked down.

(a) 10 Ves. 312.

(b) See also *Exp. Bennett*, *ib.* 399 ; *Mason v. Armitage*, 13 Ves. 38.

The result is, that the improper conduct of the appellant makes it impossible to give him the benefit of his purchase, unless it is ascertained by another sale that a better price cannot be got; and the costs of the inquiry before the Master in reference to the respondent's purchase at the first sale, and the costs of the appeal from the Master's report, as well as the costs of the resale, the appellant must bear in any event (a).

1867.

Rodgers  
v.  
Rodgers.

The order will direct a resale of the lot at an upset price of \$2,700; with all necessary directions; will declare that if no more is obtained, the sale to the appellant is to stand confirmed; and that, in either event, the appellant is to pay the costs already mentioned, and which are to be taxed after the resale: if a better price is obtained on the resale, the money paid on the appellant's purchase is to be applied, so far as necessary, to the payment of these costs; or, if not sufficient, he is to make good the balance.

Judgment.

To make this order regular, there should be a cross motion by the plaintiff: but, as this would involve additional expense to the purchaser, I presume he will not require it: if he does, the motion now before me will stand over until that motion is made.

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### CRAWFORD v. SHUTTOCK.

#### *Injunction—Trade Mark.*

The plaintiff had duly registered under the Statute, as his trade mark in the manufacture of soap, the word "Imperial," with a star following it—the defendant, in his manufacture of soap, put on his boxes the words "Imperial Bibasic Soap." An injunction was granted restraining him from using the word "Imperial," as being a portion of the trade mark of the plaintiff.

THIS was a motion for injunction to restrain the defendants from using the trade mark of the plaintiff, or any colorable imitation thereof.

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(a) *Sidney v. Ranger*, 12 Sim. 118.

1867.

Crawford  
v.  
Shuttock.

Statement.

It appeared that the plaintiff had manufactured soap which he labelled as "Imperial Family Soap," having a star placed in the centre of the label immediately after the word "Imperial,"—and had registered as his trade the word Imperial with a star. The defendants afterwards commenced the manufacture of soap, which they called "Imperial Bibasic Soap," making use also of a star on their boxes. This the plaintiff objected to, and the defendants, upon being written to, desisted from making use of the star, but insisted on their right to continue to use the words "Imperial Bibasic Soap." The trade mark used by the plaintiff was printed on paper having a blue ground with a white border, while that used by the defendants was stencilled on the box containing the soap. On the motion coming on the parties agreed to treat it as a motion for decree, the facts having been as fully brought out in the affidavit evidence adduced on the motion, as it could be on any *viva voce* examination of witnesses.

Mr. *Blake*, Q. C., and Mr. *Clarkson Jones*, for the plaintiff.

Mr. *Moss*, for the defendants.

The following cases were referred to by Counsel:—*Edelsten v. Edelsten*, (a); *Hall v. Barrows*, (b); *Young v. Macrae*, (c); *Leather Cloth Company v. Am. L. C. Co.*, (d); *McAndrew v. Bassett*, (e); *Barnett v. Leuchars*, (f); *Glenny v. Smith*, (g); *Braham v. Bustard*, (h); *Seixo v. Provezende*, (i); *Croft v. Day*, (j); *Williams v. Osborne*, (k); *Harrison v. Taylor*, (l).

(a) 1 DeG. J. &amp; S. 185.

(c) 9 Jur. N. S. 322.

(e) 10 Jur. N. S. 550.

(g) 13 W. R. 1032.

(i) 14 W. R. 357.

(k) 13 L. T. N. S. 498.

(b) 9 Jur. N. S. 483.

(d) 10 Jur. N. S. 81, and 13  
L. T. N. S. 427.

(f) 14 W. R. 166.

(h) 1 H. &amp; M. 447.

(j) 7 Beav. 84.

(l) 12 L. T. N. S. 339.

SPRAGGE, V. C.—The plaintiff's trade mark I take to be the word "Imperial" and a star. The defendants did use both, adding the word "Bibasic" after the word "Imperial." I think this was clearly a use of the plaintiff's trade mark. The defendants have, however, after the remonstrance of the plaintiff, omitted the star from their trade mark but insist upon retaining the word "Imperial." I confess I have felt some hesitation, by reason of the frequent use of the word "Imperial" as a term of designation in various branches of manufacture, as to whether the plaintiff has by his trade mark registered under the Statute, appropriated to himself the exclusive use of the word for the article manufactured by him, but upon consideration I incline to think that he has. If the word had been an adjective such as "superior," "excellent," or the like, I should have thought otherwise, and concluded that the star was the trade mark; and that a manufacturer had no right to appropriate to his own exclusive use an adjective of description of the quality of the article manufactured by him, but the word "Imperial" is a sort of fancy designation inappropriate as a description of quality, and is a mere term of distinctive designation, and must I apprehend, be taken as a part of the plaintiff's registered trade mark, and so within the Statute, which prohibits the use, by another, of any registered trade mark or "any part thereof." It is obvious that the plaintiff may be seriously injured by the use by another manufacturer of the same article, of the word "Imperial." His soap may be known among many purchasers by the designation "Imperial," and, his name not being an uncommon one, may be better known by that designation than by the name of the manufacturer, and so the soap manufactured by the defendants might be purchased under the idea that it is the plaintiff's; and with many the addition of the word "Bibasic" would make no difference. I can hardly say that it is a very strong case, and if the defendants had not insisted upon retaining the word objected to, I should not have been

1867.

Crawford  
v.  
Shuttock.

Judgment.

1867. disposed to give costs against them. As it is there will be a perpetual injunction with costs.

### MCKINNON v. McDONALD.

*Title by possession—Vendor and vendee—Practice—Supplemental answer after hearing.*

Where a vendee takes possession of the property with the knowledge and concurrence of the vendor, and pays his purchase money, he is to be regarded as in possession of the whole lot, and not merely of such part of it as he may actually occupy and improve; and after twenty years' possession by him and his successors, the title of the vendor will be extinguished.

Where on a bill for the cancellation of a Sheriff's deed as a cloud on the legal title of the plaintiff, the defendant omitted to set up by his answer one of his grounds of defence; the Court at the hearing, though against the defendant on the grounds taken by the answer, declined to make a decree in the plaintiff's favor until the other defence was tried; and on payment of costs allowed a supplemental answer to be filed, setting up the omitted defence.

Statement.

This cause came on for examination of witnesses and hearing before Vice-Chancellor *Mowat*, at the sittings at Cornwall, in the autumn of 1866.

Mr. *James Bethune*, for plaintiff, cited *Dixon v. Gayfere* (a), *Thomas v. Thomas* (b), *Young v. Elliott* (c), *Henderson v. McLean* (d), *Greaves v. Hilliard* (e).

Mr. *J. S. McDonald*, Q. C., and Mr. *D. B. McLennan*, for defendant, cited *Ferrier v. Moodie* (f), *Weld v. Scott* (g), *Allison v. Rednor* (h), *Kemp v. Garner* (i), *Dettrick v. Dettrick* (j), *Dundas v. Johnston* (k).

(a) 17 Beav. 433.

(c) 25 U. C. Q. B. 330.

(e) 1 Van. K. 326.

(g) 12 U. C. Q. B. 537.

(i) 1 Ib. 39.

(b) 2 K. & J. 79,

(d) 16 U. C. Q. B. 630.

(f) 12 U. C. Q. B. 379.

(h) 14 Ib. 459.

(j) 2 Ib. 154.

(k) 24 Ib. 547.

MOWAT, V. C.—This is a suit for the cancellation of a Sheriff's deed, purporting to convey the east half of lot No. 21, in the 6th concession of the Township of Kenyon, to the defendant, the plaintiff claiming this property as his own, and alleging that the Sheriff's deed is a cloud on his title. 1867.

McKinnon  
v.  
McDonald.

The execution under which the Sheriff's sale took place was against the plaintiff's father, *Alexander McKinnon*; and the defendant here, who was the purchaser at the sale, alleged, by his original answer, that the property was the father's, on certain grounds set forth in the answer. The cause came before me for hearing in May, 1865; and my opinion was, that the defendant had failed to establish the defence he had set up (a). His counsel contended, however, in addition to the grounds of defence contained in the answer, that the father had, before the Sheriff's sale, acquired a title by possession, and that the Sheriff's deed transferred this title to the purchaser; and I gave the defendant permission (27th June, 1865,) to apply, before the decree should be drawn up, for leave to raise this defence. An application was accordingly made to me for this purpose on the 23rd December, 1865, and was resisted. The delay in making the application having been accounted for, I was of opinion that, the jurisdiction on a bill like the present being founded entirely on the legal title, and being exercised only to give effect to the legal title, and the court having, it is said, a discretion in such suits which disentitles a plaintiff to claim a decree as a matter of right (b), a decree ought not to be made as prayed until the defendant should have an opportunity of establishing, if he could, the defence which he had omitted to state in his answer. In other words I thought

Statement.

(a) 11 Gr. 434.

(b) See 1 Story Eq. Jur. sec., 693, &c., and the cases cited.

1867. that, though the defendant had not hitherto brought an action of ejectment against the plaintiff, yet this court should not deprive him of the right of doing so at such time as might suit his own convenience, unless this court was sure that the legal title was really in the plaintiff, and not in the defendant; and I could not be sure that this was the case, until the question of possession had been tried. The defendant did, sometime since, bring an action of ejectment against the plaintiff's father, and he obtained a verdict; but as the plaintiff claimed to be in possession, the judgment was ineffectual; and an action against the plaintiff had not been brought up to the time his bill was filed.

McKinnon  
v.  
McDonald.

Statement.

The defendant desired that the question should be sent to law to be tried as between him and the plaintiff; and, on the other hand, the plaintiff strongly urged that it should be disposed of by this court. The course proposed by the plaintiff, it was found, would involve less expense than the other, unless, in case of the decision being against the plaintiff, the defendant should have afterwards to bring an action at law to obtain the possession; and I was therefore of opinion, that the proper course would be to adopt the plaintiff's proposal, on his consenting to abide by such order as this court might make (subject to appeal) for delivering possession to the defendant in case the bill should ultimately be dismissed. Otherwise, as the question was entirely a legal one, I was of opinion that I should allow an action at law. The plaintiff gave the consent suggested, and I thereupon (16th January, 1866) granted the defendant leave to set up the contemplated defence by supplemental answer, on payment of the costs of the first hearing and of the application. The supplemental answer was accordingly filed; and the cause was set down for hearing thereon on the 13th March, 1866, but was afterwards postponed by mutual arrangement until the autumn

circuit. The hearing on the new defence took place before me on the 20th October, 1866. 1867.

McKinnon  
v.  
McDonald.

The plaintiff's claim is under a deed from the patentee, *John McGillis*, dated 9th December, 1850; and the only question now remaining for me to decide is, whether *McGillis* had at this time any title to the land, or whether his title had previously been extinguished by possession (a). When the plaintiff's deed was executed, the execution debtor had not been in possession twenty years; but it is clear, from the evidence now before me, that it was considerably more than twenty years since his brothers, *Dougall* and *Angus McKinnon*, bought the whole lot, No. 21, from *McGillis*, and went into possession and commenced improving it; and I think that their possession was with the full knowledge and concurrence of the vendor.

The exact date of the purchase does not appear. Judgment. *McGillis* says in his evidence that he gave no bond or other writing to the purchasers, but that they gave him a bond for the purchase money. This bond is not now forthcoming. *Dougall* and *Angus McKinnon* are both dead, and no witness is produced, except *McGillis*, who has a personal knowledge of the transaction. He fixes the date as antecedent to a certain Parliamentary election which appears from other evidence to have been held shortly before the date of the patent.

After holding the lot jointly for a time, occupying and improving it, the brothers *Dougall* and *Angus* agreed verbally to partition the lot, *Dougall* taking the west half, and *Angus* the east half, the latter being that part of the lot which is now in question. *Dougall* remained in possession of his half until his death in or about 1844. *Angus* remained in possession of his half

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(a) U. C. Consol. ch. 88, sec. 16.

1867. for but a short time; and in 1834 *Alexander*, the plaintiff's father, with the consent of *Angus*, took possession, but under what arrangement, if any, neither party to this suit has been able to prove. *Alexander*, the plaintiff's father, has lived on the east half ever since that time. The plaintiff was born in 1838, and has always lived on the property with his father, and his father's family. *Angus* died in 1848, leaving children, and without having made any disposition of the property by deed or will. Two witnesses, the plaintiff's mother, and his aunt, *Dougall McKinnon's* widow, say they have heard *Angus* state that he meant to give the lot to the plaintiff (then a mere child); but it is plain that an expression, in conversation, of an intention to make a gift of the land, unexecuted by any deed or will, can be no foundation for a claim of legal or equitable right on the part of the plaintiff.

McKinnon  
v.  
McDonald.

**Judgment.** After *Dougall's* death, viz., on the 11th of March, 1848, *McGillis* conveyed *Dougall's* half to his son. *Angus* died in that year; and after his death *McGillis* conveyed the other, namely the east, half of the lot, at the instance of another brother *Hugh*, to the plaintiff, then about twelve years old. *Angus's* heirs are not alleged to have been parties to this transaction.

Now, more than twenty years after possession was taken by the *McKinnons* having expired before the execution of the deed to the plaintiff, the *prima facie* effect of this long possession was to extinguish the title of *McGillis* (a), and to leave in him no estate to convey to the plaintiff, though, the possession not having been for twenty years in either *Angus* or *Alexander*, neither may have acquired the legal title which *McGillis* lost (b).

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(a) U. C. Consol. c. 88, s. 16. (b) *Dixon v. Gayfere*, 17 Beav. 421.

But it was said on behalf of the plaintiff, that there had been payments of purchase money to *McGillis* within twenty years, and that this had kept alive his title. I was not referred to the statutory enactment which was supposed to favour this contention, or to any authority on the point.

1867.

McKinnon  
v.  
McDonald.

The only evidence of payments within twenty years is that of *McGillis* himself, who is a very old man, and whose memory is much impaired. His evidence was given loosely, and was uncorroborated, as to the dates of payment, by any other oral testimony, or by any entry in any book, or by any receipt or other written memorandum whatever. That the principal part, if not the whole, of the purchase money was paid about, if not more than, twenty years before the deed to the plaintiff, appears plainly enough even from the statements of *McGillis*. But he says that a small sum, how much he does not state, remained unpaid up to the year 1848, when the deed to *Dougall's* son was executed; and that a part, he does not say what part, of this small sum was then paid; that another part, two or three dollars, was paid when he executed the deed to the plaintiff; and that a small balance, though of what amount he does not mention, is not paid yet, and he does not know if the parties were aware of this small balance being due. No one who saw either of these payments made is produced to confirm the accuracy of the old man's recollection; nor does *McGillis* say who made the payments; and the subscribing witness to the plaintiff's deed does not recollect any money being paid. These payments, if made as suggested, were so made sixteen or eighteen years before the old man gave his evidence, and the prior payments were made some thirty-six years before. It is manifest that the title to land cannot safely depend upon, or be affected by, such evidence, even if it were established that satisfactory evidence of a payment within twenty years would, in a

Judgment.

1867. case like this, have the effect which the plaintiff contended for.

McKinnon  
v.  
McDonald.

It was further contended on the part of the plaintiff, that *McGillis*, having the legal title, was in constructive possession of so much of the lot as there had not been an actual possession of by others. But I do not find that this rule has ever been held to apply in favor of a vendor against his vendee who has received possession and paid his purchase money. I think it is more reasonable, and more in consonance with the authorities, to hold that the vendee should be treated as in possession of the whole lot, as between him and the vendor; and I do not think the vendor's position in this respect was changed when the vendees allowed another person, the plaintiff's father, to take possession of that part of the lot which, as between the vendees, had been assigned to *Angus*.

Judgment.

If the title of *McGillis* had not been extinguished at the time he executed the deed to the plaintiff, and that deed had given to the plaintiff a good title to the property, I am of opinion, as I stated in my judgment on the first hearing, that the possession by the plaintiff's father should thenceforward be treated as the plaintiff's possession (a). But if *McGillis* had no title at this time and, if therefore, his deed conveyed none, as is now found to be the case, it is clear that the transaction could not, and did not, affect the father's possession. This possession ripened into a title long before the Sheriff's sale, and such title passed to the defendant under the Sheriff's deed.

Therefore, decree plaintiff to deliver possession to defendant (pursuant to the plaintiff's undertaking), and to pay defendant's costs.

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(a), See the cases cited 11 Gr. 434. Also *Thomas v. Thomas*, 2 K. & J. 79; *Stone v. Godfrey*, 5 D. M. & G. 92; *Pelley v. Bascome*, 9 Jur. N. S. 1120 S. C. I. 11 ib. 52.

1867.

## WESTACOTT V. COCKERLINE.

*Practice—Amendment of Bill after Notice of Motion for Injunction.*

Where a motion for injunction stood over, and before it was again brought on, the plaintiff amended his bill by adding parties necessary to the suit, for the purpose of obtaining the relief sought thereby, and in the absence of whom such relief would not have been granted, and again brought on the motion without giving a fresh notice; the Court refused to hear the motion on this objection being taken.

In this case a motion had been made for an injunction, when counsel for defendant took an objection, for want of parties; whereupon the motion stood over, allowing the plaintiff time to consider as to the necessity of adding the absent parties. The plaintiff having amended his bill accordingly,

Mr. *Spencer* thereupon, for the plaintiff, renewed the motion.

Mr. *Moss*, for the defendants, objected that the record having been amended since the notice of motion was given, and no new notice had been served, the motion could not now be entertained, referring to *Smith v. Dixon (a)*.

VANKOUGHNET, C.—When this motion came before me originally, Mr. *Moss* for the defendant objected that certain persons, tenants of the freehold, and parties to the action at law for dower, which it is sought here to restrain, were not before the Court. Without disposing of this objection, I directed the motion to stand over till the case at law was decided, as I understood the question of election by the widow under the will was to be discussed there. In the mean time the plaintiff obtained an order to amend his bill by adding new parties, without prejudice to the motion for injunction then

Judgment.

1867. pending, and he amended his bill accordingly, and now brings on the original motion.

Westacott  
v.  
Cockerline.

Mr. *Moss* contends that the objection originally made stands good, and that the order to amend without prejudice, merely means that the plaintiff may proceed with the original motion if his material then before the Court would enable him to do so, and that it does not mean that *this* motion is to be upheld by a new case. I think this is so, and that if the plaintiff was not entitled to an injunction upon the original motion, he is not entitled to it now. I think he could not have had the injunction originally, as his record was then defective, and that he should have given a fresh notice after he corrected the defect. The motion can proceed, however, Mr. *Moss* agreeing to accept the costs of the former day.

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### FAIR V. TATE.

#### *Mortgage—Verbal Agreement.*

Where a tenant in possession being mortgagee of the property, and indebted to the mortgagor under an award in a sum exceeding the amount due under the mortgage, a settlement and compromise between the parties was effected, whereby the mortgagor agreed to discharge the amount due under the award, and also pay the mortgagee \$100 to go out of possession. Although not distinctly shewn either by parol or writing, yet the facts and circumstances were such as to induce the belief that the arrangement embraced a discharge of the mortgage debt, and the Court dismissed a bill of foreclosure filed by the mortgagee several years afterwards.

Statement.

The material facts of this case appeared to be that the defendant *Tate* had several years ago created a mortgage in favor of the defendant *Huntingford*, which he had assigned to the plaintiff, who was in possession of the mortgage premises as tenant of *Tate*. In the course of their dealings *Fair* became indebted to *Tate* in the sum of \$1234, as found by the award of arbitra-

tors, to whom the parties had referred their disputes; the arbitrators stating in their award that the amount due on the mortgage had not been deducted by them from *Fair's* indebtedness, the reason being that as *Fair* refused to produce the mortgage before them, the arbitrators thought they had no power to deduct it; and therefore it was contended the award was invalid as not determining all matters in difference between the parties.

1867.

Fair  
v.  
Tate.

The defendant *Tate*, alleged that, some years afterwards, *Fair* being still in possession of the mortgage premises, an arrangement was made between them whereby *Tate* agreed to pay *Fair* \$100, and discharge the amount due under the award if he, *Fair*, would quit the possession and cancel the mortgage debt. This arrangement was carried out; and *Tate* paid the \$100, and *Fair* gave up possession to him, but retained in his possession the mortgage deed, no writing or memorandum of any kind evidencing the arrangement having been signed by the parties, nor was there any witness who could prove the agreement.

Statement.

Several years afterwards *Fair* filed his bill on the mortgage, seeking to enforce payment of the whole amount due for principal and interest, or in default foreclosure.

This cause came on for the examination of witnesses and hearing at the sittings of the Court at Woodstock, in October, 1866.

Mr. *Huson Murray*, for plaintiff.

Mr. *E. B. Wood*, for defendant *Tate*.

Mr. *Richardson*, for defendant *Huntingford*.

1867.

Fair  
v.  
Tate.

VANKOUGHNET, C.—I think the evidence of the defence reliable. The witnesses are intelligent and respectable. I do not think the testimony of *Kilgour* as to the offer by defendant *Tate* reliable. *Kilgour* did not impress me with his truthfulness. His evidence is contradictory and inconsistent, and his manner impressed me unfavorably. He tried to be too sharp. *Spencer's* manner was not good; and considering the position taken by defendant, it seems incredible that he should have meant to admit any liability on the mortgage.

These facts I think appear :

Judgment. That at the time of the receipt *Kilgour* was the assignee of the mortgage. Either plaintiff knew this or he did not. If he did not, then he treated the plaintiff as still owning it; but *Kilgour* was his agent, and was in fact his assignee, and the plaintiff is bound by all he then did or omitted to do.

That defendant considered himself as discharged from the mortgage, and that *Kilgour* and the plaintiff both knew this. That the award though bad in form, does not appear to have been questioned by either party.

That the plaintiff did not deny that he owed to *Tate* the amount found by the arbitrators.

That either the plaintiff agreed with defendant that he was discharged from the mortgage at law, or they did not. If they did not, then they dealt with the defendant, allowing him to act under the belief that the mortgage was gone. If they did so believe, then they never asked, or ventured to ask the defendant *Tate* to restore them to their legal rights under the mortgage. Nothing it is stated was said about the mortgage. There

can be no doubt that the defendant never meant to leave himself liable on the mortgage after paying the \$100, and releasing plaintiff from his debt to him, and that he either thought the mortgage was discharged or was wiped out by the arrangement of the 18th of March. The plaintiff either thought so too, or he intended to deceive the defendant.

1867.

Fair  
v.  
Tate.

That plaintiff before this had taken legal advice, and had found out that the security was doubtful : either because of the award, or of the discharge. I think the fair conclusion is, that the defendant intended to close all matters on the 18th of March ; and that the plaintiff either did the same, or allowed the defendant to act upon that intention and belief, and took his release and his money accordingly. As far as he is concerned the result should be the same in either case. I place no reliance upon the evidence of the conversations. I do not believe that the defendant offered *Kilgour* \$500 for the mortgage, and that plaintiff refused it. It would be inconsistent with defendant's conduct, and with plaintiff's too. Defendant did not consider himself liable, and plaintiff it seems was willing to take a small amount for the mortgage in consequence of the doubt about the security.

Judgment.

The Sheriff, in answer to a question from me, says that the farm was worth in 1861 from \$5000 to \$6000. Mr. *Watson* says \$5000 cash could be got for it ; and both he and the Sheriff say that the buildings are of no great value ; that the land is near the town of Ayr. It could not therefore be by reason of the little value of the property that the security was considered doubtful.

As to the defendant *Huntingford*, Mr. *Richardson* argues that as he was not entitled to the money and had parted with the land ; he could not therefore legally discharge the mortgage, and that consequently his act

1867. innocently, though carelessly done, worked no harm.

It is not necessary to decide this point.

Fair  
v.  
Tate.

I dismiss the plaintiff's bill with costs for the reasons given above, and decree that the mortgage deed be brought into Court to be cancelled, if the defendants desire it, and they can upon their answers have such relief; as to which the parties can speak if they choose.

### ANDERSON V. DOUGALL.

#### *Will—Mortmain Acts.*

A testator by his will directed his real and personal estate to be sold, and after investing sufficient to secure an annuity for his sister, directed the trustees "to pay over the balance of the moneys so to be received from all these sources to the Treasurer or other receiving officer of such Religious or Charitable Societies as in their judgment and discretion requires it," and after the death of his sister, the sum so invested for her benefit was to be disposed of by the trustees in like manner. On a bill filed to impeach this devise as within the statutes of Mortmain, the Court as to so much of the property as was realty directed an inquiry to ascertain whether there were any, and what society or societies, of the nature contemplated by the will that could properly take real estate.

Statement.

THIS was a motion for a decree declaring that the devise by the testator as set forth in the head note and judgment was void for uncertainty; and as being within the Statutes of Mortmain; and for the appointment of a receiver of the assets of the estate on the ground of the alleged insolvency of the Executors.

Mr. *Holmsted* for plaintiff.

Mr. *Brough*, Q. C., for the Executors.

Mr. *Crooks*, Q. C., for the Attorney General.

Mr. *Holmsted* appeared also for such of the defendants as were in the same interest as the plaintiff.

*The Attorney-General v. Weymouth*, (a), *Curtis v. Hutton*, (b), *Trustees of British Museum v. White*, (c), *Currie v. Pye*, (d), *Page v. Leapingwell*, (e), were referred to.

1867.

Anderson  
v.  
Dougall.

VANKOUGHNET, C.—The testator after making several specific bequests and giving directions in regard to certain properties sold by him, thus disposed of the residue of his personal estate, and of the proceeds of certain real estate directed by him to be sold “on the further trust to invest in good securities in their discretion, such a sum or sums as will pay the annuity hereby given to my sister during her natural life, and to pay over the balance of the money to be received from all these sources to the Treasurer or other receiving officer of such Religious or Charitable Societies as in their judgment and discretion requires it, and at the death of my sister to pay over in like manner to the same or any similar Societies the sum which had been invested for the payment of the annuity, hereby declaring that the receipt of such treasurer or other officer shall be a sufficient acquittance to my said Trustees or the survivor of them, hereby expressing full confidence in their wisdom and discretion in the payment thereof.” It is contended that this disposition of so much of the property as is realty is void under the Statutes of Mortmain—which have been held to be in force in this country—and that the objects of the plaintiff are too uncertain for recognition. I will dispose of the latter objection first, by saying that when the devise or bequest is for purely charitable objects and none other, the objection of uncertainty does not lie. The Court, if necessary, will seek out fitting objects, that the intended charity may not be disappointed; and this is an

Judgment.

(a) Amb. 20,

(c) 2 S. &amp; S. 594.

(b) 14 Ves. 537.

(d) 17 Ves. 462.

(e) 18 Ves. 463.

1867. exception to the general rule on the doctrine of uncertainty. A devise for charitable purposes simply is good (a).  
 Anderson  
 v.  
 Dougall.

The devise here is to charitable or religious societies. Religious purposes are charitable purposes. The devise therefore is in favor of charity alone; the trustees have no discretion to apply it to any other purposes. When a discretion has been committed to executors or trustees to apply the moneys to purposes not strictly charitable, as in the case of a devise to charitable or *benevolent* or *generally useful* purposes, the latter two not being necessarily charities, the devise has been held void for uncertainty, as the devisees were not obliged to apply the fund to charitable purposes only. *Kendall v. Granger* (a), *Williams v. Kershaw* (b), *Ellis v. Selby* (c), *Vesey v. Janeson* (d).

Judgment. If there be any societies or bodies of the classes referred to by the testator, which by law are permitted to take real estate, then, I think, the devise does not fail, because it is to be presumed in favor of it that the testator intended that the trustees should choose, and that they will choose proper legal objects of the testator's bounty. We know that many companies and associations of the classes referred to are permitted to take and hold lands for certain purposes; and when the trustees can choose between a lawful and unlawful disposition of funds bequeathed to them, their duty is to select the former. *Sorresby v. Hollins*, (e), *Attorney General v. Whitchurch*, (f), *Mayor of Faversham v. Ryder* (g) *Edwards v. Hall* (h), *Carter v. Green* (i), *University of London v. Yarrow* (j).

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(a) See cases collected at p. 223 of Jarman on Wills, 3rd edit.

(b) 5 Beav. 300.

(c) 5 Clk & F. 111.

(d) 7 Sim. 352.

(e) 9 Mod. 221.

(f) 3 Vesey, 141.

(g) 5 DeG. M. & G. 350.

(h) 6 Deg. M. & G. 74.

(i) 3 Kay & J., 591.

(j) 23 Beav. 159.

I shall therefore direct an inquiry by the Master to ascertain whether there be any and what society or societies of the nature contemplated by the will, which can properly take real estate. *Ashton v. Langdale* (a), 1867. For this purpose it will be necessary for the Master to insert proper advertisements, as he would do were he calling upon creditors to come in and claim. Those who do come in are to be permitted to do so only on depositing a sufficient sum, in the opinion of the Master to cover the costs of the inquiry into their claims.

Anderson  
v.  
Dougall.

The Master will ascertain how much property pure personalty, was left by testator. The debts are to be charged relatively on the personalty and realty. *Roberts v. Walker* (b), *Tench v. Cheese* (c), *Simmons v. Rose* (d). The Master also to find how much property will then remain applicable to the purposes of the bequest in question.

I do not know whether the testator left any lands other than those mentioned specifically in the will. If he did, he has not disposed of them, and they would go to his heir at law, as the Trustees could not be allowed to take them, under this will, for their own benefit. This does not appear to me to be a case in which the Court would frame a scheme for the charities, but that the property bequeathed would go at once into the hands of the Treasurer or other officer of the society, to form part of its personal funds. In this view the Attorney General is an unnecessary party, and the plaintiff should pay his costs, but he can speak as to this if he sees fit. Judgment.

Reserve further direction and costs. As to costs see *Whicker v. Hume* (e), and *Carter v. Green* (f).

(a) 4 DeG. & Sm. 402.

(c) 6 DeG. M. & G. 453.

(e) 14 Beav. 528.

(b) 1 Russ & M. 752.

(d) 6 DeG. M. & G. 411.

(f) 3 K. & J. 591, 598.

1867. Subsequently the Chancellor directed the decree to be drawn up reserving the costs of the Attorney-General.

McDONELL V. STREET.

*Injunction—Practice—Amendment after notice of motion*

Where after serving a notice of motion for injunction, and before the motion is made, the plaintiff amends his bill; such amendment is an answer to the motion.

Statement. In this case a motion had been made for an injunction, which stood over at the request of the defendant, for the purpose of procuring affidavits in answer to those filed in support of the application.

Mr. *Blevins*, for the plaintiff, renewed the motion, when it appeared that in the interval the plaintiff had amended his bill without having served any fresh notice of motion, and,

Mr. *Strong*, Q. C., for the defendants, objected the motion could not be proceeded with; the record having been altered since the notice had been served, referring to *Gouthwaite v. Rippon*, (a) and *Smith v. Dixon* (b)

MOWAT, V. C., thought the objection fatal, and refused the motion.

Mr. *Blevins* thereupon asked leave to serve short notice, which was given for the following day, when the motion was renewed before the Chancellor, and on the merits being gone into His Lordship refused the application.

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(a) 1 Beav. 94.

(b) 12 W. R. 934.

1867.

GILL v. GAMBLE.

*Solicitor's lien—Mortgagor—Mortgagee.*

A Solicitor having a lien on certain title deeds as against his client, for costs generally, was subsequently employed by another person to prepare a mortgage from such client, when his professional connection with the mortgagee ceased. A second mortgage was created in favor of another person. On default in payment of the money secured by such second mortgage the mortgagee sold the estate under a power of sale contained in the mortgage. *Held*, that the lien of the Solicitor upon the title deeds in his possession, as against the mortgagor, continued as against the purchaser.

THIS was a motion for decree to compel the defendant *Gamble*, to deliver up certain deeds in his possession upon which he claimed a lien for costs due him by one *Andrew Ward*, to whom the property originally belonged. The facts appear in the head note and judgment. Under the circumstances so appearing

Statement.

Mr. *Fitzgerald* for the plaintiff,—the purchaser of the mortgage promises at the sale under the power contained in the mortgage—contended that he was entitled on redeeming the prior incumbrancer, *Gillespie*, to a delivery up of all the title deeds of the mortgage property freed of the lien of the Solicitor, who in the transaction of the mortgage from *Ward* to *Gillespie*, had acted as the Solicitor of the mortgagee; his duty on that occasion was to see that all the title deeds connected with the property were handed over to his client, the mortgagee; and that he could not now assert such lien against the purchaser.

Mr. *G. D. Boulton*, for defendant *Gamble*.

Mr. *Crooks*, Q. C., for *Gillespie*.

VANKOUGHNET, C.—In this case the facts are that Mr. *Clarke Gamble* had been for some years solicitor for one *Andrew Ward*; that while acting as such his

Judgment.

1867. solicitor, *Ward* effected a loan with one *Gillespie*, but not through the agency of *Gamble*: that *Gillespie* employed *Gamble* as his solicitor to prepare a mortgage from *Ward* to secure the loan; that *Gamble* did prepare the mortgage, and procure its execution, and shortly after transmitted it, with an abstract of title taken from the books of the registry office to Mr. *Moffatt*, in Montreal, as the agent in this country of *Gillespie*, who was resident in England; that thereupon *Gamble's* employment by or for *Gillespie* ceased, and that he never again appears to have acted in any way for *Gillespie*, who some years afterwards employed, as his solicitors, Messrs. *Crooks, Kingsmill & Cattanach*, to sue upon the mortgage. In the course of the preparation of the mortgage-*Gamble* received some, if not all the title deeds of the property from *Ward*. *Ward* was then indebted to *Gamble* as his solicitor, and this indebtedness was subsequently increased. *Gamble* has retained these deeds ever since, and has never been called upon by *Gillespie* for them, and he claims a lien on them for his professional services to *Ward*. Subsequently to the execution of the mortgage to *Gillespie*, *Ward* executed a further mortgage on the same property to one *Austin*, with a power of sale in case of default. Default having been made, *Austin* acted upon the power of sale, and the equity of redemption thus mortgaged to him was sold to the plaintiff *Gill*, who has since paid, or arranged to pay off *Gillespie's* mortgage, and now claims to have the deeds of the property in the possession of *Gamble* delivered up to him by the latter, freed from any lien upon them as against *Ward*. This, I think, he is not entitled to. At the time of the mortgage to *Austin*, *Gamble* held these deeds, and, subject to the rights of *Gillespie* as mortgagee, he had a lien upon them for his professional claim against *Ward*. Of course *Gamble* acting for *Gillespie* and not having at the time reserved as against him such right of lien as he then had, he could not have withheld the title deeds from *Gillespie*.

Gill  
v.  
Gamble.

Judgment.

But *Gillespie* does not claim them, and he appears now by his counsel saying that he merely requires to be paid off, which the plaintiff, *Gill*, has done or made arrangements to do; as indeed he must or lose the estate. If he does not pay off *Gillespie* and the latter should have to enforce his demand by sale or foreclosure, then indeed to him or his assignee, *Gamble* may be obliged to deliver up the deeds; but *Gill* now takes the place of *Ward* on the estate, as owner of the equity of redemption, which remained on the execution of the mortgage to *Gillespie*. He is to pay off *Gillespie*, as *Ward* would have done; and as *Ward* could not have obtained these deeds from *Gamble* without satisfying his lien upon them, so neither can *Gill*, who claims under him. I think that *Gamble* is entitled to a lien for all services rendered as solicitor to *Ward* up to the time of the execution of the mortgage to *Austin*; and I do not understand that anything more is asked for. Of these, the plaintiff, paying the costs of suit, can have an account.

1867.

Gill  
v.  
Gamble.

# TORONTO SAVINGS BANK V. CANADA LIFE ASSURANCE COMPANY.

## *Practice—Dispensing with Personal Representative.*

A life policy was assigned to one *F.*, absolutely, who afterwards left the country. The insured died insolvent, and no one administered to his estate. The plaintiffs claimed the assurance money, alleging that the assignment had been made in trust for them, to secure a larger sum owing to them by the assignor. The insurance company declining to pay the amount to the plaintiffs, they filed a bill to compel payment, and moved under the general order, No. 30, (June, 1853), that they might be at liberty to proceed without a personal representative to the estate of the insured; but the Court held the case was not within the order.

THIS was an application on the part of the plaintiffs that they might be at liberty to proceed with the suit in

Statement.

1867. the absence of any person representing the estate of *James Hallinan*, deceased, or that this Court should appoint some one to represent his estate for the purposes of this suit (a).

Toronto Sav-  
ings Bank  
v.  
Canada Life  
Assurance  
Co.

It appeared that *Hallinan*, on the 29th September, 1858, insured his life in the defendants' company for \$3,000. On the 23rd October of the same year, he assigned this policy to *Denis Kelly Feehan*, and notice of the transfer was given to the defendants immediately afterwards. *Feehan*, subsequently left the country. The plaintiffs alleged that *Feehan* was their officer, and that this assignment was executed to him in trust to secure a debt owing to them by *Hallinan*, and exceeding in amount the sum insured. The trust did not appear in the assignment. *Hallinan*, it was said, died intestate, insolvent, and without any known relations in this country. No one had taken out administration to his estate.

The Company were the only defendants, and the object of the suit was to obtain payment of the amount of the policy.

Mr. *Fitzgerald*, for the application.

Mr. *S. Blake*, contra.

*Tarratt v. Lloyd*, (b); *Sherwood v. Freeland*, (c); *Robinson v. Bell*, (d); were referred to.

Judgment. MOWAT, V. C.—[After stating the facts proceeded:] The defendants, by their answer say, amongst other things, that they are, and always have been, ready and willing to pay this claim to the parties entitled

(a) G. O. of June, 1853, No. 30.

(c) 6 Gr. 305.

(b) 2 Jur. N. S. 371.

(d) 1 DeG. & S. 630.

to receive the same and give a proper discharge 1867. therefor, but they submit that they should not be required to assume the responsibility of inquiring into the state of the accounts between the Savings Bank and *Hallinan*, or whether the assignment was made to *Feehan* for his own individual benefit, or in trust for the Savings' Bank, or into the validity of the assignment as against the creditors of *Hallinan*. The defendants submit that they are entitled to a discharge from the personal representative, or to the order and decree of this Court; and allege that they are prepared to pay over the amount on being sufficiently discharged or protected. They also submit that *Feehan* and the personal representative of *Hallinan* are necessary parties to the suit.

Toronto Sav-  
ings Bank  
v.  
Canada Life  
Assurance  
Co.

Having reference to all these circumstances, and to the decisions on the statutory enactment in England which corresponds with our General Order, I am of opinion that the case is not within the meaning of the General Order, and that the motion must therefore be refused, with costs. Judgment.

### ST. VINCENT V. GRIER.

*Township Councillor—Payment for services—Accounting for over-payment—"Officers."*

A Councillor or Reeve of a Township is entitled as compensation for his services to the *per diem* allowance provided for by the Statute only; and any over-payments may be recovered back by the municipality; the word "Officer" used in the Statute not applying to the Reeve or a Councillor, as parties to whom compensation is to be voted by the council: he will be entitled, however, to receive from the municipality payment for moneys out of pocket, advanced by him on account of the business of the municipality.

The defendant had been for several years Reeve and Councillor of the Township of St. Vincent, and during Statement.

1867. that time received and collected moneys belonging to the township. He also received moneys for extra services on the affairs of the township, and also for gratuities voted to him by the council during the time he was Councillor or Reeve ; and he was paid a sum of \$106 for superintending the making of a road running through the township.

St. Vincent  
v.  
Grier.

The plaintiffs filed a bill for an account of the moneys so received by the defendant while he was Councillor and Reeve—and for re-payment of moneys received by him for extra services over and above the statutory allowance.

Statement. The defendant claimed the protection of the Statute of Limitations—and also that from time to time he had furnished accounts of moneys received by him to the Treasurer, and that the accounts were audited, and that the audit barred any right to an account by the plaintiff. That gratuities were voted to him without his interference and influence for his skill in the management of the affairs of the township, and that the same being voluntary payments, he ought not to be ordered to account therefor. The defendant also alleged that he had made several special journeys to Toronto and Owen Sound about the affairs of the township, and that he only received his actual disbursements ; and submitted that the remedy of the plaintiffs (if any) was at law, and not in this Court.

The cause came on for hearing at the sittings at Barrie, in the spring of 1866, before Vice-Chancellor *Spragge*.

Mr. *Roaf*, Q. C., for plaintiffs.

Mr. *Strong*, Q. C., and Mr. D. *McCarthy*, for defendants.

SPRAGGE, V. C.—The defendant was Reeve of the township of St. Vincent, during the years 1856, 7, 8, and 9, and the years 1862, 3, and 4. During the years 1860 and 1861 he was a member of the Council. The charges against him are: that he received moneys belonging to the Corporation, for which he has not accounted; that he has charged for services which he has not rendered; and that he charged for services for which he is not entitled to be compensated otherwise than by the *per diem* allowance warranted by the statute.

1867.

St. Vincent  
v.  
Grier.

Instances are given in the bill, to which may be added what is stated in his answer, that he received gratuities voted to him from time to time for his skill, diligence and management of the affairs of the municipality.

1st. As to moneys received.

It did not properly appertain to his office either as Reeve or simple Councillor to receive the public moneys of the Corporation; that was the business of the Treasurer; he admits however, that he did receive such moneys, and says he accounted for them. He claims protection of the audit under the statute, and as to sums received before July, 1859, of the statute of limitations. I see no answer to the latter.\* As to the former, if he was not a proper officer to receive and account for these moneys, I do not see that the audit will protect him. The audit is for the protection of the Municipality. He may have submitted accounts of what he had received, and not have accounted for all; or the audit may have been only of what the proper officer the Treasurer received, *i. e.* *quoad* the defendant, of moneys received by him and accounted for to the Treasurer. If so, that cannot excuse the defendant for moneys, if any, received by him, not

Judgment.

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\* See *Blakie v. Staples*, ante p. 67, the judgment in which was published before the present judgment was received from V. C. Spragge, now in England.

1867. accounted for. As to these moneys, he was, in a sense, a wrong doer, *i. e.*, in usurping the functions of the proper officer of the Corporation. I think the audit cannot excuse him from accounting for what came to his hands.

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As to compensation for services *e. g.* overseeing construction of roads.

Judgment

The late case of *In re Blaikie v. Corporation of Hamilton*, seems to apply to it in principle. But the only report I have seen is in the *Globe* newspaper of 13th September, 1866.\* In that case the Councillors seem to have voted to themselves *i. e.* to each Councillor \$20 for year's services as Councillor, and \$10 "for services for letting and superintending repairs of roads." This was by By-law, which was quashed, the Court holding "that such a By-law should shew upon its face, that it is within the statutory power. Here it does not appear that the money directed to be paid, is for the attendance of the members in Council, nor if so at what rate, and as to the ten dollars, it is clearly intended as a remuneration not authorized." The whole By-law was therefore quashed.

In the case before me, it is somewhat different. It is a specific sum for a specific service, but the case applies in principle. It is obviously against public policy that any member of the Council should derive personal benefit from the expenditure of the public money. It brings his interest in conflict with his duty, or may do so. It may be for his interest to vote for an unnecessary or injudicious public work in order to bring him the advantage of overseeing it. It might possibly make a difference, though I hardly think it should, if this was a work not voted by the Township, but by the County, as it seems to have been. Here the gravamen of the charge appears to be that he was paid by the Township Council, in ignorance of his being paid for the same service by the County Council.

\* Since reported, 25 U. C. Q. B., 469.

It seems to have been the same service. He was as Reeve a member of both Councils, Township and County, and supposing him to have received compensation from the County, the proper quarter I conceive, if a County work, and if entitled to compensation at all, he was wrong in receiving compensation from the Township also. The Township by their resolution, seem to have demanded less of the defendant than they were entitled to. He received as others did for the like service, (as he says himself) \$1.50 a-day, and was employed 40 days in overseeing that part of the road, which ran through the Township, and for this he received from the County \$60. His receiving \$106 from the Township as compensation for the same service was altogether unwarrantable, and the whole should be refunded. As to the items mentioned in the 13th paragraph of the bill, and others of the like nature referred to in it, the case in the Queen's Bench goes the length of deciding that members of the Council can receive no compensation for extra services, and therefore, all sums received by way of compensation for services as Reeve or Councillor must be refunded.

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Judgment.

In regard to the journeys to Toronto and Owen Sound, all that the defendant charges, or at any rate says that he was paid for, were disbursements out of pocket. I incline to think that his expenses upon all journeys which he undertook by the direction of the Council, and for which the Council has paid him, should be allowed to him, and those also which were sanctioned by the Council afterwards. The *per diem* allowance could not be intended to cover such charges, and it would perhaps be too much to disallow them. To do so would be to narrow the choice of those to be sent upon such a mission, and might exclude those most conversant with the affairs to be debated, and if there is no pecuniary benefit to be derived, and if even loss of time is not compensated for, there is not much danger of abuse. I think, that in accounting for moneys received, the plaintiff should be allowed all

1867. money properly so expended, and indeed I do not understand the plaintiffs to object to such allowance.

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As to the right of a Council to vote gratuities to its head or officers ; the Reeve is not "an officer" of the Corporation, within the meaning of the term "officer" used in the statute, this is apparent from several clauses of the Act, particularly Section 3, 537 and 556. The statute distinguishes between members of the Council and officers of the Municipality ; it is the remuneration of the latter only that the Council is authorized to settle. The reason of the distinction is obvious.

As to the remedy being at Law and not in this Court. The defendant in several paragraphs of his answer, *inter alia*, the 4, 13 & 15, admits having received moneys, but gives no particulars or on what account, but only that they were the public moneys of the Township. In his examination he says that he received moneys payable in respect of tavern licenses and of Clergy Reserve moneys.

Judgment.

If the defendant were a properly constituted agent of the Municipality to collect their moneys, the plaintiffs would be entitled to an account from him in this Court, and if he received these moneys irregularly, constituting himself an agent, he would, I apprehend, be in no better position ; nor can the rights and remedies of the parties entitled to the moneys, be abridged.

The Decree must be with costs against the defendant.

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1867.

## LAVIN V. O'NEILL.

*Practice—Creditor's Suit—Master's Report—Priorities of Creditors—  
Notice of hearing on further directions—Trustees' Costs.*

In a creditor's suit, it is the duty of the plaintiff, having the carriage of the decree, to see that the Master's Report states the priorities of the creditors.

Creditors who have proved debts in the Master's office, but are not parties to the cause, should not be served with notice of the hearing on further directions.

Where trustees sever in their defence, only one set of costs will be allowed, except on special grounds; and these, when they exist, ought to be set up in their answers. Mere distance of residence does not in all cases justify severing.

THIS was a hearing on further directions, which came on to be heard before Vice Chancellor *Mowat* on the 12th February, 1867.

Statement.

The suit was a friendly one by a creditor of *Samuel G. Lynn* for the execution of the trusts of two deeds whereby certain lands were conveyed for the benefit of *Lynn's* creditors. It appeared from the bill that the first deed was dated 13th April, 1859, and that thereby certain land was conveyed to the defendant *Peter James O'Neill*, in trust for such of the creditors as should execute the deed, the deed containing a clause releasing *Lynn* from the debts of the executing creditors; that on the 6th August, 1864, other land was conveyed to the defendants *Henry Pellatt* and *Michael Hayes*, for the same purpose; that this deed contained no release clause; that the lands covered by the two deeds were the property of the debtor's wife, *Mary Lynn*, and were vested in *William Wallis* and *Thomas G. Wallis*, two other defendants, as trustees for her; that the deeds were executed by these trustees, and by *Lynn* and his wife; and that the lands had not been sold.

1867. All the defendants answered. A decree was made by consent, 20th March, 1866. The Master made his report 10th November, 1866, shewing that the lands had been sold under the decree for \$630; and on the 21st January, 1867, he made his general report, finding that the debts proved, including interest and costs, amounted to \$7,633 44.

Lavin  
v.  
O'Neill.

Mr. *Donovan* for plaintiff.

Mr. *S. G. Wood*, for the *Bank of British North America*, a creditor who had proved in the Master's office.

Mr. *D. Mitchell McDonald*, for the defendants..

Judgment.

MOWAT, V. C.—[after stating the facts and proceedings to the effect above set forth]—All the parties to the suit appeared before me and concurred in asking that the costs of all, as between solicitor and client, should be paid out of the fund in Court, and that the balance should be divided amongst the creditors according to their respective priorities. But as these creditors are not consenting parties, I have to consider whether the decree, as asked, appears from the pleadings and report to be proper.

First, then, as to Mrs. *Lynn's* former trustees, *William* and *Thomas G. Wallis*. These defendants were unnecessary parties, having, as appears from the bill, conveyed all their estate in the lands to the trustees for the creditors. It was unnecessary for them to put in an answer; and neither by the answer which they filed, nor at the hearing, did they object that they were unnecessary parties. The bill will therefore be dismissed as against them without costs (*a*).

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(*a*) *Williams v. Williams*, 1 W. R., 318.

The defendants *Samuel G. Lynn* and *Mary Lynn*, 1867.  
the grantors, asked for their costs out of the fund ; but  
I see no ground for granting them. They seem to be  
in the same situation in this respect as mortgagors are  
on a sale of mortgaged property, where the proceeds  
are insufficient to pay the mortgage debts.

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The trustees, *O'Neill*, *Pellatt*, and *Hayes*, appeared  
by different solicitors ; and the reason was stated at the  
bar to be that two of them resided at a distance from  
the third ; but no such excuse is alleged in the answers.  
I may add that the mere circumstance of residing in  
different and distant places has not always, standing  
alone, been thought sufficient to justify burdening an  
estate with two sets of costs (*a*), though it may be an  
important element in deciding the question of allowance  
(*b*). No other argument was offered for allowing the  
double costs in the present case.

Judgment.

There will therefore be only one set of costs allowed  
to the three trustees. The plaintiffs seem entitled to  
their costs, in the absence of any objection by anybody  
to their receiving them. Both bills must be taxed as  
between solicitor and client.

It was stated at the bar, that, of the creditors who had  
proved, some were entitled to priority over others ; but  
no priority is provided for by the deeds as set out in the  
bill, and none is found by the Master. The decree I  
make on the case, as it now stands, must therefore be,  
that the balance remaining after paying the costs, shall  
be distributed *pari passu*. The decree will find and  
name the sums to be paid, so that no further reference  
or application will be necessary.

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(*a*) *Farr v. Sheriffe*, 4 H. 512.

(*b*) *Cummins v. Bromfield*, 3 Jur. N. S. 657.

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If any of the creditors are really entitled to priority, they have the right of applying by petition, setting forth their rights, and claiming the proper relief; but the estate cannot be burdened with the costs which the omission to have the matter determined by the report may occasion. If the materials for finding the priorities were before the Master, the plaintiff, having the carriage of the decree, should have seen that the report set forth the priorities. If a written consent by all the creditors is produced, an application by petition will not be required.

It was said that the creditors who had proved, and who were four in number besides the plaintiff, had all been served with notice of this hearing. This was unnecessary, and the costs of the service are not taxable. One of these creditors appeared on further directions, and claimed costs; but the rule now is, that persons unnecessarily served, who choose to appear, are not entitled to the costs of appearing (a).

Judgment.

It afterwards appeared that the purchasers had not paid their purchase money into Court; and the Vice-Chancellor therefore directed that no order should be drawn up till the sales were completed, and the money paid into court.

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(a) See the cases collected Morgan & Davey on Costs, 43, 44.

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## FRASER V. FRASER.

*Practice—Notice of Motion—Affidavits.*

In giving notice of motion, and that the party moving will read certain affidavits, if the same are filed at any time before the date of the notice of motion, the notice must state the day of the filing thereof, otherwise the affidavits cannot be used on the motion.

This was a motion for injunction. The notice was dated the 2nd February, 1867, and had been served at Cornwall on the 18th, and stated that “upon the motion would be read the affidavits of *Alexander Fraser*, *John Fraser* and *William Fraser* filed, and by leave of this Court such other affidavits as may be filed before the motion.” Statement.

Mr. *Fitzgerald* for the plaintiff.

Mr. *S. Blake*, contra, objected that the affidavits mentioned could not be read, as it appeared they had been filed on the 1st of February, and the practice did not require a party searching for affidavits to look further back than the date of the notice of motion—*Daniels’ Chancery Practice*, Vol. 2, page 1197 (3rd Ed). The fact that the three affidavits mentioned in the notice are the only affidavits filed in the cause could not affect the question.

MOWAT, V. C.—As the objection is taken, I believe that I am bound to give effect to it, and must refuse the application. Judgment.

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## THE BANK OF MONTREAL V. WALLACE.

*Practice—Delivery of possession, order for.*

An order for delivery of possession is only made against persons not parties, when they acquired possession *pendente lite* from a party to the suit, and have no pretence of having a paramount title, though the rule may be somewhat broader in the case of receivers and sequestrators.

**Statement.** On a motion before Vice-Chancellor *Mowat*, by a purchaser under a decree in a mortgage suit, that *William Burnett*, who was said to have possession, should deliver up the possession to such purchaser; an affidavit was filed by *William Burnett*, alleging that he was in possession as agent for Mrs. *Burnett*, who was not a party to the suit. The Vice-Chancellor ordered the motion to stand over, with liberty to serve Mrs. *Burnett* and one *Macfarlane*, said to be in possession under her in some way, with notice of the motion. Such notices were accordingly served and the motion was renewed.

Mr. *Roaf*, Q. C., and Mr. *Crickmore*, for the motion.

Mr. *Hector Cameron*, contra, referred to the *Bank of Montreal v. Ketchum* (a).

**Judgment.** MOWAT, V. C.—This was a motion on behalf of a purchaser under a decree for sale of mortgaged property (the Ontario Distillery). The motion is for possession, and the difficulty is that Mrs. *David Burnett*, as administratrix *cum testamento annexo* of her husband, claims to be in possession, and she is no party to the suit.

Ordinarily an order for possession is only made against the parties to the suit. Indeed I have found

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no precedent of its being made against one who was not a party except in favor of a receiver, or to make available a sequestration (a), and it has been expressly held that such an order cannot be made in favor of a mortgagee in a foreclosure after final order (b). But if in a plain case a party who takes possession *pendente lite* without any pretence of paramount right, may be dealt with in this summary way in favor of a purchaser under a decree for sale, the rule must, I think, be confined to such cases.

In the present case the facts seem to be these: The deceased *David Burnett* was the indorser on some of the notes secured by the mortgage, and by reason of this interest he was made a party to the bill. But he was also a lessee of the property under a lease bearing date the 13th of November, 1863, and made between the defendant *William Burnett*, the owner or apparent owner of the equity of redemption (his co-mortgagor, *John S. Wallace*, having executed a release in his favor), of the first part, *David Burnett* of the second part, and the plaintiffs, *The Bank of Montreal*, of the third part, whereby the property was, with the consent of the Bank, demised by *William Burnett* to *David Burnett* for one year, from the 27th of November, 1863, at a rent of \$2000, payable quarterly to the lessor *William Burnett*. The business of the distillery appears to have been thenceforward managed in whole or in part by *William Burnett*, as agent for *David*.

Judgment.

In May, 1864, the Bank filed their bill against the mortgagors, *Wallace* and *William Burnett*, and *David Burnett* and others, taking no notice of the lease. The bill was taken *pro confesso* against these defendants named, and a decree containing the usual directions was made on the 10th of January, 1865. *David Burnett*

(a) *Prentiss v. Brennan*, 1 Gr. 434; 2 Gr. 18, 322, 582.

(b) *Bank of Montreal v. Ketchum*, 1 Chamb. Rep. 117.

1867. died in July following, leaving *William Burnett, John Sutherland* and *Peter Murdoch*, his executors. The suit does not appear to have been revived as against the executors, though the Master by his report (which is dated the 11th of August, 1865), names them as, with others, the parties to pay the mortgage money. *William Burnett* acted as executor, and carried on the business as such, for some months after the testator's death. He did not prove the will, however; nor did his co-executors: and, having lately renounced probate, the widow of the testator was appointed administratrix *cum testamento annexo*; and *William Burnett* has since acted as her agent, and holds possession in that capacity, as both now swear. The administratrix claims to be entitled to hold possession as against the plaintiffs and the purchasers for a period which has not yet expired, on the ground of an understanding alleged to have taken place with the Bank at the time of the lease being executed, and to have been afterwards acted upon in the sense of part performance by *David Burnett* as well as the Bank; and payment of rent with the concurrence of the Bank, and other alleged transactions, after the expiration of the year, are also relied upon as creating as against the plaintiffs a tenancy from year to year, which it is said still subsists; but while these statements are made to show that the administratrix has a substantial claim, which has to be tried, it is objected that I have no jurisdiction to adjudicate on it upon the present motion; and with some reluctance I have come to the conclusion that this contention is correct. I say with some reluctance, because the delay and expense to which the parties may be put by this decision, may not be attended with any legitimate advantage to either; but on the whole, I apprehend that, if I should assume to decide on this motion such matters as are in question between the plaintiffs and the administratrix, she not being a party to the suit, and not submitting to the jurisdiction of the court, I would be doing what neither express authority nor fair analogy would warrant. I

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have therefore refrained from forming any decided opinion on the merits, and refuse the motion as unauthorized. 1867.

The administratrix must have her taxed costs; *William Burnett*, 40s. costs; no costs to other parties.

### GARTSHORE V. THE GORE BANK.

*Demurrer—Misjoinder—Frame of bill.*

A claim was compromised, the creditors agreeing to receive in satisfaction part of the debt, secured by acceptances of B. indorsed by C. who were no parties to the contract. Before the acceptances were given, a bill was filed by the debtor and proposed acceptor for the specific performance of the agreement:

*Held*, on demurrer, that the latter was improperly joined as co-plaintiff.

The absence of any allegation that the proposed indorser had indorsed or was ready and willing to indorse, was also held to be a fatal objection.

Where a bill is filed to restrain the seizure of the goods of A. on an execution against B., on the ground that the goods have a peculiar value which damages would not compensate, there should be distinct and precise allegations of the necessary facts: and a general allegation that the damage will be irreparable is not sufficient, on demurrer.

General demurrer to bill for want of equity.

The bill was by *Alexander Gartshore* and *John Gartshore*, plaintiffs, against *The President, Directors, and Company of the Gore Bank*, *Edward C. Thomas*, Sheriff of the County of Wentworth, *William Irvine*, *James Beaty Grafton*, and *John Proctor*, defendants. Statement.

Mr. *Proudfoot*, for the demurrer.

Mr. *Crooks*, Q.C., contra.

MOWAT, V. C.—The bill states two grounds of relief.

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The first is, in substance, that the plaintiff *John Gartshore* had become liable to the defendants, the Bank, as accommodation indorser on certain promissory notes of one *James McIntyre*, amounting to about \$9,500; that the Bank commenced an action at law against the said *John Gartshore* on these notes; that *Gartshore* filed a bill here to restrain this action; that on the 31st October, 1866, a compromise was agreed to, and embodied in a consent decree; that thereby the Bank was to accept \$2,500 in full of all demands; that this sum was to be secured by five bills to be drawn by *John Gartshore*, accepted by *Alexander Gartshore*, the other plaintiff in the present suit, and indorsed by one *Richard J. Wilson*, who is not a plaintiff or defendant; that *Alexander Gartshore* agreed to perform what this agreement required of him; that both plaintiffs have always been ready and willing to carry out the agreement; and that the Bank is, notwithstanding, proceeding to enforce an execution on the judgment recovered at law against *John Gartshore*. The prayer is, that the agreement may be specifically performed, and the action restrained.

Judgment.

To this case the demurring defendants object, amongst other things, that it does not appear by the bill that *Alexander Gartshore* is interested in the compromise which the bill seeks to enforce, or that *Wilson*, who was to indorse the bills, has indorsed, or is ready or willing to indorse them.

*Alexander Gartshore* certainly has no interest in the relief prayed. Indeed, his interest is rather the other way; the becoming surety, so far from being ordinarily a benefit to a man, having from time immemorial been regarded as a calamity against which it was the part of wisdom to guard and to warn; and if the agreement in question is enforced, the only effect as to *Alexander Gartshore*, so far as the bill discloses, would be that he must occupy that undesirable and dangerous position. But it is very clear that a person having no interest in

the relief prayed, cannot be joined as a co-plaintiff (a). 1867.  
 I understand objections for misjoinder of plaintiffs  
 to be still open to a defendant on demurrer (b),  
 though no longer available at the hearing of a cause (c). Gartshore  
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Gore Bank.

I think that the want of any allegation that *Wilson* has indorsed, or is ready and willing to indorse, is also a fatal objection; and I do not say that even with an allegation of readiness and willingness on *Wilson's* part, a bill for specific performance would have been sustainable (d).

The other branch of the case may be treated as for an injunction to restrain the Sheriff from seizing under the execution certain chattels belonging to the plaintiff *Alexander Gartshore*, and thereby closing the business he is carrying on, but in which the plaintiff *John Gartshore*, according to the allegations of the bill, has no seizable interest whatever. This would be restraining the Sheriff from committing a trespass, for which the plaintiff's proper remedy is at law; and in ordinary cases the observations of the Vice-Chancellor in *Garsten v. Asplin* (e) apply: "If (the plaintiff's) possession is intruded upon, he has a remedy at law. The Sheriff has no right to seize. If he does seize, it may be very injurious to the plaintiff, and is to be regretted; but this Court cannot interfere where there is a legal re- Judgment.

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(a) *The King of Spain v. Maehado*, 4 Russ. 231; *Davies v. Quarterman*, 4 Y. & C. 257.

(b) *Beeching v. Lloyd*, 3 Drew. 227; *Westbrooke v. Attorney-General*, 11 Grant 266.

(c) General Orders of June, 1853, No. 31.

(d) See *Pickering v. Bishop of Ely*, 2 Y. & C. C. C. 249; *Gervais v. Edwards*, 2 D. & War 84; *Waring v. The Manchester, Sheffield and Lincolnshire Railway Co.* 7 H. 492; *Nickels v. Hancock*, 7 D. M. & G. 327; *Hope v. Hope*, 22 B. 351; *Vansittart v. Vansittart*, 4 K. & J. 76; *Ogden v. Fossick*, 9 Jur. N. S. 288; *Blackett v. Bates*, 1 Law Rep. Eq. 124.

(e) 1 Madd. 150; see also *Jackson v. Stanhope*, 10 Jur. O. S. 676.

1867. medy. The right to take in execution is a question of law. Injunctions would be applied for every day where executions were improperly issued, if the Court were to assume a jurisdiction in such cases." But where there is any equitable ground for relief, no doubt this Court does interfere with such executions at law, of which the cited cases of *Newman v. Paynter* (a) and *Langton v. Horton* (b) and the cases collected in 1 *Lindley* on Partnership, page 588, to which I was also referred, are examples. As equitable grounds for relief in the present case, it was said that the good will of a valuable business would be destroyed by the Sheriff's seizure; that the chattels he threatens and intends to seize and sell, have a peculiar value to the plaintiff *Alexander*; and that the damage to the plaintiff would, for these reasons, be irreparable.

But I do not find any allegations to this effect in the Judgment. bill.

As to the good will, the allegations to which I was referred are contained in the first paragraph of the bill, which merely alleges that "the said *John Gartshore* for many years carried on the said business of an iron founder and machinist at the town of Dundas, in co-partnership with *James Bell Ewart*; and in the course of such business, obtained great reputation for their skilful execution of different works in their said business, and especially in the construction of steam engines and machinery incidental thereto." The bill then proceeds to state that on the decease of *James Bell Ewart* in 1853, *John Gartshore* continued to carry on the business; that on the 1st May, 1865, he took into partnership with him his son, the plaintiff *Alexander*; that on the 6th September, 1866, the partnership was dissolved, *John* retiring from the business, and *Alexander* continuing it thenceforward on his own account and for his own benefit;

(a) 4 M. C. 408.

(b) *Langton v. Horton*, 1 H. 58.

that the partnership estate and effects were thereupon vested in the plaintiff *Alexander*, he undertaking to pay all the liabilities of the partnership, and to pay over to *John Gartshore* one half of the surplus; that in December following, the estate was found insolvent; that a composition was proposed by *Alexander* to the creditors, to be secured by an assignment of the estate with a provision for continuing the business under the inspection of trustees; that many of the creditors had agreed to accept the terms proposed; and that all, or nearly all, will accede to it as soon as they can be heard from.

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There is no express statement that there is a valuable good will belonging to the business now, or even that the reputation which the bill states to have been acquired during Mr. *Ewart's* lifetime; continued afterwards; and, in the absence of any such allegation, it is impossible to hold on demurrer that the other allegations I have mentioned are sufficient to shew that there is any valuable good will which the Sheriff is about to destroy. The right to relief on that ground, if sustainable, must be supported by precise and distinct allegations of the necessary facts.

Judgment.

Then, as to the peculiar value of the chattels which the Sheriff is said to be about to seize, the allegations are these: "In and upon the said foundry premises there is a large and valuable quantity of effects; some being machinery and plant of a valuable nature used in the conduct of the said business; and others being engines, boilers, machinery and works in progress and in course of construction, or of repair for divers parties, customers of the said business; and some of the same being constructed under special contracts, which, if not fulfilled at the time stipulated thereby, will entail great loss on the plaintiff *Alexander Gartshore*. Amongst others, the said plaintiff hath, by deed, contracted to complete an engine and two boilers, with the necessary machinery complete, for the English and Canadian Mining Com-

1867. pany of Quebec, the damages for the non-comple-  
tion of which are fixed at the sum of \$25 *per diem*."

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Gore Bank.

The bill also alleges that if the Sheriff and the Bank are permitted to proceed with the said writ of execution as they threaten and intend to do, great and irreparable injury will be sustained by the plaintiff *Alexander*, for which he cannot have, and has not, at law any adequate remedy or relief. But it is objected that there is no allegation that if these chattels are seized, others of the same kind cannot be conveniently or readily procured in their place; or that the contracts referred to cannot be completed in time if the Sheriff takes possession of the chattels in question. Such allegations seem to me essential, according to the doctrine laid down by this Court in the cases respecting saw logs, in several of which cases I was myself counsel while at the bar (*a*); and the general allegation of irreparable damage is not, I think, sufficient to dispense, on demurrer, with the specific allegations men-  
Judgment. tioned; for the damage may be irreparable for reasons or in a sense which would not give this Court jurisdiction.

The bill does not explain why the Sheriff is seizing the property of *Alexander* on an execution against *John*; and I think it should have contained some statement on the subject. There is no allegation, either, that the plaintiffs have given the Sheriff notice that the property does not belong to the execution debtor. It is to be presumed that if the fact is so, and the Sheriff had notice of it, he would not seize; and it cannot be proper that, the moment a man's property is proposed to be seized as the property of another, he should, instead of addressing himself to the Sheriff, rush into this Court for relief. Equity can only interfere where the necessity for such interference is made to appear.

If the bill had not been demurred to, and the cause had proceeded to a hearing on the bill as it stands, all

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(*a*) *Farwell v. Wallbridge*, 2 Gr. 339; *Flint v. Corby*, 4 Gr. 53.

these objections to the frame of the bill would probably have been disregarded, or an amendment permitted in order to remove them. But on demurrer, I think effect must be given to them. 1867.

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The plaintiff's right to relief is perhaps open to some other objections argued at the bar, but which it has not been necessary for me to consider, and perhaps to some objections which were not argued.

Demurrer allowed with costs. Leave to amend.

### STICKNEY V. TYLEE.

*Specific performance—Practice—Reading answer.*

A testator devised his real estate in trust for sale; shortly after his death a friendly suit was instituted in the Court of Chancery in England, for the administration of the estate, to which suit the trustee was a defendant; in this suit an order was made for the appointment of a receiver to collect the assets in Canada, and sell the lands there; after the death of a receiver appointed under this order, the agents of the trustee in Canada, who had managed the estate for the deceased receiver, continued to collect the assets and make sales, with the knowledge and concurrence of the trustee and the parties in England. *Held*, that such sales were not void, and would be enforced or not, according as to this Court appeared in view of all the circumstances to be proper; and a decree was made for the purchaser in respect of the sale in question.

A defendant, by his answer, admitted that he was devisee as alleged in the bill; but added that his right to deal with the property had been taken away by a suit for administration in England. *Held*, that the latter statement was not an explanation of the former: and that the admission as to the will might be read by the plaintiff as evidence without making evidence of what followed that admission.

This cause came on for the examination of witnesses and hearing before Vice-Chancellor *Mowat*, at Guelph, in the autumn of 1866.

1867.

Stickney  
v.  
Tylee.

Statement.

A question then arose as to the right of the plaintiff to read part of the defendant's answer. The bill was for the specific performance of a contract said to have been entered into by the defendant for the sale of a lot of land in the Township of Waterloo, and in the first paragraph of the bill it was alleged that the defendant was devisee in trust of this lot and other lands. The only proof of this allegation which in the first instance the plaintiff offered was an admission in the answer in the following terms: "I admit the truth of the first paragraph of the said plaintiff's bill of complaint; but I say," and then the defendant proceeded to state that the estate was insolvent; that it had for the last thirty years been administered by and under the direction of the Court of Chancery in England; and that all acts done by him in relation to the estate were done by and under the direction and decree of said Court.

Mr. *Snelling*, for the defendant, contended that the plaintiffs could not read the admission without entitling the defendant to read these statements; referring to *Rude v. Whitchurch* (a), *Freeman v. Tatham* (b), *Davis v. Spurling* (c), *Nurse v. Bunn* (d), *Calcott v. Maher* (e).

Mr. *Drew*, contra.

MOWAT, V. C.—It is clear that the statements added to the admission are not explanatory, within the meaning of the rule on which in support of his contention the defendant relies, and that the circumstance of their being connected with the admission by the word "but "

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(a) Russ. 156.

(b) 5 Hare, 329.

(c) 1 Russ. & M. 68.

(d) 5 Sim. 225.

(e) 2 Moll. 316.

is no ground for reading them (a). It is no explanation of a will to say that the powers which the devisee would have had under it have been limited by subsequent events; just as an allegation of payment is no explanation or qualification, within the meaning of the rule, of an admission of previous liability (b). The answer did not aver, nor does counsel in argument suggest, that the defendant was not, as devisee in trust, authorised by the terms of the will to sell; and, therefore, as the will relates to the defendant's title, I think the plaintiffs were under no technical necessity of producing it, or giving any further evidence of it.

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Stickney  
v.  
Tylee

A second argument of the cause took place in Toronto, when the will was produced; also the proceedings in the English suit, and the communications between the defendant and his Canadian solicitors and agents. Argument.

The same counsel appeared for the parties respectively as at Guelph.

*Russell v. Baker (c), Tidd v. Lister (d) Browell v. Bead (e), Tait v. Jenkins (f), Middleton v. Dodswell (g), Mortlock v. Buller (h), Fairfield v. Weston (i), Edwards on Receivers, pp. 15, 133, 134; Seton on Decrees, 1007, 1039; Houlditch v. Donegal (j), Berkley v. Reay (k), Faulkner v. Daniel (l),* were referred to.

(a) Vide *Davis v. Spurling, ubi supra*; and *Bartlett v. Gillard*, 3 Russ. 156.

(b) *Counor v. Hayward*, 1 Y. & C. CC. 33; *Miller v. Gow, Ib.* 56; *Boardman v. Jackson*, 2 B. & B. 355; *Freeman v. Tatham*, 5 Hare, 329.

(c) 1 Hogan, 180.

(e) 1 Hare, 434.

(g) 13 Ves. 266.

(i) 2 S. & S. 96.

(k) 2 Hare, 306.

(d) 5 Mad. 429.

(f) 1 Y. & C. 492.

(h) 10 Ves. 310.

(j) 8 Bligh, N. S. 343.

(l) 3 Hare, 199.

1867. *MOWAT, V. C.*—This is a suit for the specific performance of a contract alleged to have been entered into by the defendant, through his agents, for the sale of lot No. 11, in the sixth concession of Pilkington, containing about 117 acres.

*Stickney*  
v.  
*Tylee.*

The plaintiff *Stickney* was the purchaser; and his co-plaintiff *Richard Harper* is joined, because *Stickney* has entered into a sub-contract to sell and convey the property to *Harper*. It was objected that *Harper* was not a proper party (a); but by the present practice objections for misjoinder of plaintiffs are not available to a defendant at the hearing (b).

Judgment. The lot in question constitutes part of the estate of the late General *Pilkington* (c), who by his will devised all his estate, real and personal, to his trustees for payment of his debts, the residue to be divided amongst his children. The will also contains an express power to sell. All the trustees, except the defendant, disclaimed; and it is not disputed that the defendant had authority to sell, so far as the question depends on the will.

The bill alleges that on or about the 27th of October, 1848, the defendant, through his agents in Canada, entered into a written contract with one *Francis Harvey*, for the sale of the lot to him for \$500, to be paid in annual instalments, and that on the same day *Harvey* paid \$50 on account of the purchase money; that the plaintiff *Stickney* afterwards paid *Harvey* and one *Wagner* for their improvements on the land; that the

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(a) Vide *Nelthorpe v. Holgate*, 1 Coll. 203; *Anon. v. Walford*, 4 Russ. 372; *Chadwick v. Maden*, 9 H. 188; *South Eastern Railway Co. v. Knott*, 10 H. 122.

(b) General Order, No. 31, June, 1853.

(c) See *Ratz v. Tylee*, 11 Gr. 342.

agreement *Harvey* held was thereupon given up to the defendant's agents, Messrs. *Cameron* and *Robinson*; and that they entered into a new agreement with the plaintiff *Stickney*, for the sale of the lot to him on payment of the balance of *Harvey's* purchase money. This was in 1854.

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Stickney  
v.  
Tylee

The defendant, by his answer, admits that Mr. *Strachan*, in the defendant's name, and professing to be his attorney for the purpose, executed a contract with *Harvey* as set forth in the bill; but the defendant denies Mr. *Strachan's* authority to sign any such agreement. There is other sufficient evidence of Mr. *Strachan's* having entered into the agreement with *Harvey*; and sufficient evidence that Mr. *Robinson*, then the defendant's solicitor, and assuming to be his agent for this purpose, entered into the agreement with *Stickney* which is stated in the bill.

It appears that many years ago a friendly suit was instituted in the Court of Chancery in England by *Thomas Tylee* and *Charles Tylee*, creditors of the testator, suing on behalf of themselves and all his other creditors, against *Edward Tylee*, the defendant here, and others, for the administration of the testator's estate. The defendant is a solicitor, and his firm are, and always have been, the plaintiffs' solicitors in that suit.

Judgment.

A general receiver, resident in England, was appointed to receive all moneys of the estate; and an order was made for the appointment of another person as receiver in Canada, to collect the money of the estate, and to sell the lands of the testator here. The defendant was declared by the order to be at liberty to appoint the Canadian receiver his attorney for the purpose of making conveyances to purchasers; and the defendant was also to be at liberty, subject to the approbation of the Court, to sell

1867. in England any large portion of the testator's Canadian lands. The late Mr. *Hagerman* was the first Canadian receiver appointed; he died in 1847; there was no receiver in Canada from that time until 1851, when Mr. *Brock* was appointed; Mr. *Brock* died in 1854; and no one was appointed in his place until lately, when Mr. *Lapontiere*, the present receiver and the defendant's solicitor in this suit, got the appointment.

Stickney  
v.  
Tylee.

Judgment.

After Mr. *Hagerman*'s death, the business of the estate was carried on by the successive firms who were solicitors for the estate: *Strachan & Cameron*, *Cameron*, *Brock & Robinson*, and *Cameron & Robinson*; sales were made; money was collected; and all these transactions were reported every half year to the defendant—while there was no receiver or other person authorized by power of attorney to act, just as at other times. There were many sales made when there was no receiver; and until about 1859, the defendant does not appear to have objected to any of them; and no sale appears to have taken place after the defendant gave directions to that effect. The correspondence between England and Canada seems to have been either wholly or principally with the defendant as representing the parties interested in the estate in England. The sale to *Harvey* was, amongst others, duly reported to the defendant, and also the transfer of this purchase to the plaintiff *Stickney*. The sums received here from *Harvey* and from *Stickney*, were likewise reported in due course. All this was without objection on the part of either the defendant or any one else on behalf of the • estate.

It is not denied that the money paid by *Harvey* and *Stickney* was duly accounted for to the estate.

Under the circumstances, I am of opinion that if the defendant had been beneficial owner he could not, at this

late date, dispute the authority of Mr. *Strachan* and Mr. *Robinson* to enter into the contracts in question.

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Stickney  
v.  
Tylee.

He was, however, a mere trustee. It was not contended that, independently of the proceedings in Chancery, the defendant living in England had no power, as trustee under the will, to authorise an agent to sell the lands of the testator in this country (a). But the contention was, that the authority of an agent selling for a trustee could not be established by such evidence as appears here; and must be an express authority given in writing. *Mortlock v. Buller* (b) was cited in support of this contention; but I do not understand that case as laying down any such doctrine, and I have found no other case maintaining it.

It was contended, also, that *Tylee's* power to sell was taken away by the proceedings in England. No objection, however, was made for want of parties.

Judgment.

The defendant's legal power was certainly not destroyed by those proceedings; and whatever might be the effect of them in equity in case of estates in England, I find no authority for holding that the effect here is what the learned counsel claimed for them. The English Court has no jurisdiction over lands in Canada, and can only dispose of them by its jurisdiction over parties holding the title and residing within the jurisdiction of that Court. There was no injunction against the defendant's selling—the suit appears to have been for his protection as trustee more than anything else; he has evidently the confidence of the creditors, and of all in England who are interested in the estate; and nothing but a stringent technical rule would justify me in refusing relief to a party dealing, under such circum-

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(a) *Stewart v. Norton*, 3 Law T., N. S. 57      (b) 10 Ves. 310.

1867. Stickney  
v.  
Tylee. stances with the defendant's agents here, in good faith, with his knowledge and concurrence, and without notice (so far as appears) of the administration suit, purchasing for a fair price, and on terms agreeing substantially with those indicated by the order of the Court in England; entering into possession; improving the property; paying his money; his purchase being duly reported; his money in due course received by the trustee, and duly accounted for to the estate; and there being no one else at the time authorised to act for the estate in this country. I have no doubt, though there is no direct evidence of the fact, that all parties interested in the estate in England, either personally or through their solicitors well knew what was going on in this country; and it would be unjust that the purchaser should lose his property, after the lapse of so many years, at the mere will of an after-appointed receiver, or be compelled to accede to any terms that the receiver may dictate. I cannot find any authority that would sustain me in doing this injustice; and I think the fair rule is, to regard purchases, made during the pendency of the English suit but otherwise free from objection, as purchases which are to be enforced or not according as, in view of all the circumstances, may seem to this Court to be proper.

Judgment.

I think that on this principle the plaintiffs are entitled to a decree.

The defendant produced at the hearing certain papers which appear to have been prepared for execution as between the plaintiff and defendant after the contract in question was made, but were not executed. They treat the purchase money as \$700. The defendant's counsel endeavoured to prove by Mr. *Robinson*, that these papers were prepared in his office, and shewed the terms of the contract; and failing in this, leave was

asked to supply such proof hereafter. I think the defendant should have this opportunity. 1867.

Stickney  
v.  
Tylee.

Decree for specific performance in the usual terms in other respects; and injunction to stay the action of ejectment which the defendant has brought. In computing the amount due, interest to the day of payment must be added, unless it shall appear that the money has been idle since the tender. The plaintiffs are entitled to their costs up to decree, same to be set off against the money to be paid by the plaintiff. Subsequent costs reserved until after report.

Decree.

# JONES V. THE BANK OF UPPER CANADA.

*Practice—Purchase by Mortgagee at Sheriff's sale.*

The plaintiffs filed a bill for foreclosure. The defendants set up that they were absolute owners of the property by virtue of a tax sale and the proceedings in a foreclosure suit. Both defences failed; and the defendants therefore claiming at the bar that the plaintiffs should redeem the prior mortgage, the Court granted a reference in such terms as would enable the defendants to establish that claim, if well founded, in the Master's office.

This was a motion by the defendants to vary the minutes suggested in the judgment of Vice-Chancellor *Mowat* at the hearing of this cause, reported *ante* p. 78.

Mr. *G. D. Boulton* for the motion referred to, Cons. Stat. U. C., ch. 87, sec. 1.

Mr. *Snelling* contra, referred to Cons. Stat. U. C. ch. 22, sec. 29.

*MOWAT, V. C.*—After the delivery of my judgment in this cause, it was intimated that the defendants claimed

1867. the right to have the mortgage to *Williams* redeemed by the plaintiff.

*Jones*  
v.  
Bank U. C.

Judgment.

For the plaintiff, it was insisted that, by the purchase by the Bank at the Sheriff's sale, and the deed executed by the Sheriff on the 22nd November, 1865, the mortgage in question had become merged in the equity of redemption, and had lost its priority to the subsequent mortgages now in the plaintiff's hands. Reference was made to the Consol. St. U. C., ch. 22, sec. 259, which provides that, in the event of a mortgagee purchasing the mortgaged property under a writ of *fi. fa.* against the lands of the mortgagor, he should give to the mortgagor a release of the mortgage debt, and that if any one else becomes such purchaser, and the mortgagee enforces payment of the debt against the mortgagor, the purchaser is to repay the amount to the mortgagor; and the case of *Woodruff v. Mills (a)* was cited, in which it was held by the Court of Queen's Bench that the legal effect of such a purchase by a mortgagee or his assignee is a satisfaction of the debt, though no instrument of release is executed by him.

Here the question does not arise between the defendants and the mortgagor *Williams*, but between the defendants and the holders of a subsequent mortgage; and the learned counsel for the defendants, in answer to the plaintiff's argument, referred to the Consol. Stat. U. C., ch. 87, sec. 1, which provides that any mortgagee, or any assignee of such mortgagee, may purchase the equity of redemption under any judgment, without thereby merging the debt as against a subsequent mortgagee.

I do not think it necessary to express any opinion on the effect of the Sheriff's deed in reference to this

1867.

Jones  
v.  
Bank U.C.

enactment, because, were my opinion in favor of the defendants, I would, notwithstanding, think it right to direct a reference, as I find, on looking at the answers, that this claim was not set up in either of them; the defendants having relied therein exclusively on those grounds of defence on which they hoped to defeat the plaintiff altogether. Having failed in that object, I think they should not be precluded from claiming that the plaintiff must redeem the *Williams* mortgage; but I think that the plaintiff should have the opportunity of bringing forward any facts bearing on the question, which it may not have been material to establish for the purpose of the issues raised by the answers. Thus, it appears that the mortgage to *Williams* comprised other lands besides those on which the plaintiff has a lien; if the plaintiff redeems that mortgage, he is entitled to a conveyance of all the lands mentioned in it; and it does not appear whether the defendants are in a situation to make this conveyance—whether they now hold the other lands or have disposed of them. The defendants cannot claim the right of being redeemed as to that mortgage, if they have put it out of their power to execute such a conveyance as the plaintiff on redeeming would be entitled to receive.

Judgment.

It was contended, also, on the part of the plaintiff, that the sale by the Bank to *Price*, and the payment of the purchase money, effected a merger, and disentitled the Bank to require redemption of the *Williams* mortgage. That sale was under an erroneous supposition that the Bank had a good title to the land, free from the plaintiff's incumbrance; and, since the plaintiff has established that the conveyance to *Price* did not give such a title, I do not at present see that, independently of other circumstances, the transaction should affect the question I am considering; if ineffectual against the plaintiff, it would not be just that it should operate to improve his position.

1867. The construction of the statute relied on by the defendants received some consideration from the Court on the rehearing of *Finlayson v. Mills* reported in Mr. Grant's 11th volume (a).

Jones  
v.  
Bank U. C.

Judgment.

If the defendants insist on this claim, the decree will contain the declaration mentioned in my judgment on the hearing of the cause (b); but, instead of the other directions therein mentioned, there will be a reference to the Master to inquire whether there are any other incumbrances on the property; to ascertain the priorities of all incumbrances, including the plaintiff's, and the amount due to each; and to find and state any special circumstances. Further directions and costs will be reserved. The Master will be directed also to make Mr. *Proudfoot* a party in his office.

### BANK OF MONTREAL V. RYAN.

#### *Practice—Apportionment of Costs.*

Where, on an appeal from a Master's report some of the objections are allowed with costs, and some are disallowed with costs, the appellants are entitled to all the costs of the appeal that are exclusively applicable to the objections allowed, and to a share of those costs common to all the objections according to, not the mere number of the objections as stated in the notice, but to the really distinct grounds of appeal. The same rule applies to the respondent's costs.

This was an appeal from the Accountant's certificate of the costs of an appeal from the report of the Master at Guelph.

Mr. *Cattanach*, for the appeal, cited *Heighington v. Grant* (c); *Pelly v. Wathen* (d); *Seton* on Decrees, page 94.

(a) p. 218.  
(c) 1 Beav. 228.

(b) 13 Gr. 78.  
(d) 7 Hare 351.

Mr. *S. Blake*, contra, referred to *Marshall* on Costs, 1867. pages 131-133; *Fayakerley v. Rogerson* (a), *Hazlewood v. Back* (b), *Prevost v. Bennett* (c).

Bank of  
Montreal  
v.  
Ryan.

MOWAT, V. C.—There were seven reasons of appeal from the report. At the close of the argument I allowed the first ground of appeal with costs, and in effect disallowed the others with costs.

The reference to review the report and tax these costs appears to have been made by consent of parties to the Accountant, who only allowed the appellants one-seventh of their costs of the appeal, because but one of the seven grounds was allowed.

I think that was not quite correct. According to the rule laid down in *Heighington v. Grant* (d), and ever since recognized, the plaintiff was entitled to all such costs of the appeal as related exclusively to the objection which I allowed; and to a share of those costs which were common to all the objections according, not to the mere number of the objections stated in the notice, but, to the number of really distinct grounds of appeal. Now I find from my notes of the argument, that the 3d, 5th, and 7th objections, related to interest, and constituted substantially one objection. The 6th objection was a mere reiteration of the prior objections, and should not on the taxation have been counted as a separate objection. The 1st, 2nd, and 4th objections appear distinct, and adding to these the objection as to interest, the number of distinct objections appears to be substantially four, and the appellants were therefore entitled to one-fourth of the costs common to all the objects of the appeal. The comparative amounts involved in the res-

Judgment.

(a) 1 L. M. & P. 748.

(c) 2 Price 272.

(b) 9 M & W. 1.

(d) 1 Beav. 228.

1867.

pective objections appear to be immaterial in considering the question of apportionment (a). The same rules apply to the respondent's costs.

Order—Taxation to be reviewed. No costs of the present appeal.

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ROSS V. PERRAULT.

*Mortgage—Set off—Practice—Appeal from Master's Report.*

Where a mortgage was to secure advances to be thereafter made from time to time, and interest thereon, and there were mutual accounts between the parties, the items of which were entered in the mortgagee's books, with the concurrence of the mortgagor, who was his clerk :

*Held*, that the credits given therein to the mortgagor were first applicable to the interest on all these advances, and then to the eldest of the principal sums charged.

P. owed B. two debts; one secured by mortgage, and one unsecured; and P. had a counter claim against B. P. executed a subsequent mortgage in favor of R., who filed a bill to redeem B.'s mortgage. Up to the time of filing the bill there had been no act appropriating the counter claim to either the secured or the unsecured debt, and both the counter claim and the unsecured debt had become barred by the statute of limitations :

*Held*, that the plaintiff was not entitled to set off the counter claim against the mortgage debt.

Where a party appealed on certain grounds against the Master's report, and some of these were allowed and the report referred back to be reviewed :

*Held*, that an appeal against the further report thereon would not lie for matters disposed of by the first report and not objected to on the first appeal.

This was an appeal by the plaintiff against the Master's report, dated 6th November, 1866.

The bill was for redemption of two mortgages execu-

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(a) Hardy v. Hull, 15 Beav 358.

ted by the defendant *Perrault* in favor of *James Fraser* and one *Henry Bull*, respectively, and then held by the defendants *The Commercial Bank*, the respondents in this appeal. The plaintiffs were owners of a subsequent mortgage.

1867.

Ross  
v.  
Perrault.

*Bull's* mortgage, dated the 29th September, 1848, was to secure, amongst other things, "all such sum or sums as might thereafter be due upon merchandize to be advanced by the said *Henry Bull* to the said *Hypolite Perrault*," with interest.

*Perrault* was at this time and for several years afterwards a clerk in *Bull's* shop, and received from *Bull* from time to time money and goods, which with *Perrault's* knowledge and concurrence were from time to time charged to him in *Bull's* books. Credits were also given to *Perrault* with his knowledge and concurrence in the same books, for various sums.

Statement.


There were other sums to which he was entitled against *Bull*, and which were never credited in the books. These were not equal in amount to the unsecured debt.

On the whole account, including the secured and the unsecured items, there was, after giving credit for all the credits claimed, a large balance due from *Perrault* to *Bull*, but if all the credits were set off against the mortgage debt, it was admitted that that debt would probably be wholly wiped out. The chief question on the appeal was as to the application of these credits.

Mr. *E. Crombie* for the appeal.

Mr. *Downey*, contra.

MOWAT, V. C.—The plaintiffs by the first ground of appeal claim that the credits in the books should be ap-

1867.  ROSS  
v.  
Perrault. plied in payment of the oldest items on the debit side of the account in the same books. The Master has in effect applied them first to pay the arrears of interest on the items comprised in that side of the account. I think this is correct; and it is consistent with what I intended by my judgment on the former appeal.

The second objection refers to two items which the Master allowed by his report of 22nd May, 1866, and his allowance was not objected to on the appeal from that report. I think it cannot be objected to now.

The third objection is, that the Master should have credited against the mortgage *Perrault's* salary for the years 1849 to 1853, respectively, at the end of each year. The fourth objection claims credit against the mortgage for some other sums chargeable against *Bull* by *Perrault*.

Judgment. *Bull's* advances to *Perrault* consisted partly of merchandize, which were secured by the mortgage, and partly of cash, which the mortgage did not cover. The salary and other particulars covered by the third and fourth objections were not credited in the books, and there was no agreement as to the way in which they should be applied.

The Master has treated the cash received by *Perrault* as payments on account of these items, and *Perrault* acquiesces in this application. It is not claimed that any other appropriation was ever made by either party; but the plaintiffs insist that, as subsequent mortgagees of the property mortgaged to *Bull*, they have, as matter of law, the right of setting off the salary and other particulars against the mortgage debt. No case was cited in support of this contention (a). Besides, all right of

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(a) And see *Peters v. Anderson*, 5 Taunt. 596; *Mills v. Fowkes*, 5 Bing. N. C. 455.

action by *Bull* for the cash and by *Perrault* for the other items, was barred long since by the Statute of Limitations; and the rule is that there can be no set off for a claim barred by the Statute of Limitations (*a*). I think these two objections must be overruled.

1867.  
  
 ROSS  
 v.  
 Perrault.

The next four objections are that the Master has allowed certain items as merchandize without sufficient evidence that they were charges for merchandize. I think that in an action at law between *Bull* and *Perrault* on the covenant in the mortgage, the evidence as to these items would have been sufficient to go to a jury; and I do not think there is enough in the case to justify my interfering with the Master's view of it.

The ninth objection is disposed of by the order made on the third objection, taken and overruled on the former appeal. The tenth objection raises the same question as the third, and must be overruled. The eleventh objection relates to the rent of the mortgaged premises, which the plaintiffs claim to be applicable to the mortgage debts. The respondents do not dispute the claim, but insist that the rents have in effect been applied to the mortgage debts; but this does not appear to be so. This objection must therefore be allowed.

The plaintiffs and the respondents *The Commercial Bank* will have their costs of the Appeal as costs in the cause.

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(*a*) Buller's N. P. 180; Cooper v. Turner, 2 Stark. 497; Chapple v. Durston, 1 C. & J. 1; Walker v. Clements, 15 Q. B. 1046; Ford v. Spafford, 8 U. C. Q. B. 17.

1867.

## IN RE—CÆSAR'S WILL.

*Construction—Petition 29 Vic. ch. 28, sec. 31.*

On a petition to obtain the opinion of the Court on the construction of a will, under 29 Vic. ch. 28, sec. 31: *Held*, that the Court could not give any opinion on such a point upon petition; and the Court declined to make an order saying whether a bill would be proper.

This was a petition to obtain the opinion of the Court on the construction of a will, under the statute 29 Vic. ch. 28, sec. 31.

Mr. *S. H. Blake*, for the petitioners, referred to *In re Mocketts' Trusts* (a).

Statement. MOWAT, V. C.—I have already had occasion to point out (b) that by the late decisions in England on the corresponding enactment there, it is held that the Court cannot, on such a petition as this, make the declaration desired. It was suggested by Mr. *Blake* that I might, at all events, so far consider the will as to say, as *Sir W. Page Wood* did in *Re Mocketts' Trusts*, that the case was a proper one for the executors to take the opinion of the Court upon by bill. But the case cited was disposed of when the Courts in England took a different view of the Act from what they take now, and were in the habit, on such a petition, of expressing an opinion on the construction of the will; and I think the order desired was incident to that practice, and cannot be made under the view of the Act now entertained. The learned counsel for the petitioners needs no opinion of the Court as to whether the true meaning of the will is or is not sufficiently doubtful to make a bill proper; and if a petition for that purpose was recognized as a correct practice, the Act, instead of saving expense to parties, would hereafter, in many cases, very uselessly increase it.

(a) 6 Jur. N. S. 142.

(b) *Re Owens*, 1 Ch. Cham. 372.

## CLARK V. THE BANK OF MONTREAL.

1867.

*Bill of Exchange—Bill of Lading—Set Off.*

Where C. shipped flour to the order of a Bank for account of L., and at the same time drew on L., discounted the bill at the Bank, indorsed and delivered to the Bank the carrier's receipt, and signed a memorandum stating that the receipt had been indorsed as collateral security for the payment of the draft, the Bank to sell the flour, applying the proceeds to pay the draft, and to place the property in charge of any respectable broker or warehouseman, without prejudice to the Bank's claim upon any party to the draft. *Held*, that the Bank, though bound to retain the flour until the bill was accepted, might then, if they chose, deliver the flour to L., the fair construction of the agreement being that the retaining of possession until payment was optional with the Bank.

*Quære*—Whether, if the Bank was responsible for the flour under circumstances which prevented a set off at law, that relief could be had in Equity.

This was a bill by *David Clark* against the Bank of Montreal, and set forth as follows :

That, on the 3rd of July, 1866, the plaintiff drew a Statement.  
bill of exchange for \$640.86 upon *William Long*, of Kingston, payable thirty days after the date thereof; and on or about the said date procured the same to be discounted by the defendants in the ordinary course of their business at the defendants' Branch Bank in the town of Guelph.

That the plaintiff had also, on or about the said 3rd day of July, shipped 200 bags of flour by the Grand Trunk Railway Company, consigned to the order of the Bank of Montreal for account of the said *William Long*, and received from the station master of such railway, at Rockwood, a shipping or railroad receipt for the said flour to the purport and effect that the Grand Trunk Railway Company had received from the plaintiff the said 200 bags of flour addressed to the order of the Bank of Montreal for account of *William Long*, Kingston, to be sent by the said company, subject to their tariff, and on the conditions on the said receipt stated.

1867. That such receipt, according to the usages and practice in such cases, placed the property and control of and in the goods mentioned in such receipt in the Bank of Montreal, and the said railway company could, in the course of their duties as carriers, and according to the practice and usage in such cases, and the requirements of the said receipt, deliver the said goods only upon and subject to the order of the said Bank.

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Montreal.

Judgment.

That concurrently with obtaining the said receipt, the plaintiff drew the aforesaid bill of exchange mentioned in the first paragraph, in order the better to obtain payment from the said *William Long* of the price or purchase money of the said goods, and the said receipt was expressly taken subject to the order of the said Bank to secure the plaintiff in the due payment of the said price, and with the intent and object that until payment by the said *Long* of the said bill so drawn on him, the said goods should remain in the legal possession and control of the said Bank.

That the plaintiff, concurrently with drawing the said bill of exchange, and obtaining the same to be discounted by the defendants, delivered to the manager of the said defendants said Branch Bank the said railroad or shipping receipt for the said 200 bags of flour, and thereupon the following agreement was entered into between the plaintiff and the defendants in the words and figures following, that is to say :

“The Bank of Montreal are hereby authorized to sell, or cause to be sold, at public auction, or by private contract, as and whenever they may deem best, all or any part of the flour specified in the annexed receipt indorsed by me on the 3d day of July, to the said Bank, as collateral security for the payment of the draft for \$640.86, in favor of myself upon *William Long*, due the 6th August next, which draft is endorsed by me and

by ———, and has been discounted by the said Bank. Provided, always, the net proceeds of the sale or sales of the said property remaining after deduction of all costs and charges, be applied to or towards the payment of the said discounted paper, or of any renewal thereof that may be taken by the said Bank, and the surplus, if any, be paid to ———. And I do hereby further agree that the taking of the said collateral security and the authority to sell the said property, shall not affect the rights of the said Bank on the said discounted paper before or after its maturity, or on any renewal thereof against any of the parties thereto; and further, that the said property shall be at my own risk in case of casualty or loss; that I shall at my own expense cause insurance thereon against loss or damage, by fire or by transportation to the extent of ———, to be effected, and shall assign the policy of insurance to the said Bank; and in default of my so doing the said Bank may cause such insurance to be effected at my own expense, but it shall not be obligatory on the Bank so to do; and, lastly, the said Bank is hereby further authorized to place the said property in charge of any respectable broker or warehouseman for storage or sale, without prejudice to the Bank's claims upon any party to the said discounted paper."

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The Bank of  
Montreal.

Judgment.

"Dated at Guelph the 3d July, A.D., 1866.

DAVID CLARK;

"Per J. CLARK."

That under and by virtue of such railroad or shipping receipt, the defendants became and were entitled to have and did have the full legal power and control of the said flour, and under the said agreement were bound to retain such possession and control until payment by the said *William Long* of the said bill of exchange; and in the event of non-payment of the said

1867. bill by the said *William Long*, the plaintiff became entitled to an account from the defendants, of the said flour and their disposition thereof.

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Montreal.

That the defendants, notwithstanding the express terms of the said agreement, indorsed over the said railroad or shipping receipt to the said *William Long*, and thereby enabled him to procure the said flour from the railroad company on or soon after it arrived in Kingston, and before the payment of the said bill of exchange and before the time for payment thereof had elapsed: and the said *William Long* did not pay the said bill at the maturity thereof, or at any time since, and the said *William Long* shortly thereafter became insolvent, and by reason of the default of the defendants in the premises the price of the said flour has been altogether lost to the plaintiff.

Judgment. That the defendants took from the said *Long*, on delivering to him the said flour, a memorandum in the words and figures following:

“Received from the Bank of Montreal the 200 bags of flour above mentioned, and I hereby undertake to sell the property therein mentioned for account of the said Bank, and collect the proceeds of the sale or sales thereof, and deposit the same in the said Bank at Kingston to the credit of the discounted paper above mentioned: hereby acknowledging myself to be bailee of the said property for the said Bank.

“Dated at Kingston the 7th July, A.D., 1866.

WILLIAM LONG,

“Per THOS. MCKEEVER.”

That the said *William Long* was not then a warehouseman or broker within the meaning of the said agreement; that the said *William Long* afterwards sold the said flour, and subsequently left Canada for the United States of America, and at the time he so left he was and still is in insolvent circumstances.

That the defendants allege that no portion of the proceeds of the said flour were paid to them by the said *William Long*, and they seek to compel the plaintiff to pay the said draft in full, and refuse in any way to account to the plaintiff for the value of the said flour; that the defendants have commenced and are prosecuting an action at law in Her Majesty's Court of Common Pleas for Upper Canada against the plaintiff to recover the amount of the said bill of exchange from the plaintiff without giving the plaintiff any credit whatever for the value of the said flour, which the plaintiff says was greater than the amount of the said bill of exchange.

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The plaintiff charged that under the said agreement hereinbefore set forth, the defendants were liable to account to the plaintiff for the value of the said flour, and prayed that the defendants should be ordered to account to the plaintiff accordingly, and that the proceeds thereof should be applied to the payment of the said draft, and prayed an account; an injunction to restrain the action at law, and for further relief.

Judgment.

The defendant filed a general demurrer for want of Equity.

Mr. *Blake*, Q. C., and Mr. *McLennan* in support of the demurrer.

Mr. *Crooks*, Q. C., contra.

*The Bank of Wisconsin v. The Bank of Montreal* (a), *Jeffreys v. The Agra Bank* (b), *Berry v. The Columbian Ins. Co.* (c), *Agra Bank v. Hoffman* (d), *Webster v. Webster* (e), *Parsons on Mercantile Law*, p. 63, were referred to.

(a) 2 U. C. App. 282.

(b) 2 L. R. Eq. Ser. 675.

(c) 12 Gr. 418.

(d) 11 Jur. N. S. 335.

(e) 31 Beav. 393

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 Montreal.

Judgment.

MOWAT, V. C.—The learned counsel for the plaintiff endeavored, on the argument of this demurrer, to show that the bill sufficiently alleged a sale of the flour to *Long*; but I am clear that I cannot so construe the bill. There is no express allegation that the transaction was a sale to *Long*. If there was a sale, it must, judging from the bill, have been a sale on credit, and yet the goods not to be delivered until the price was paid. But even such a sale is not alleged. On the contrary, the bill prays that the defendants may account to the plaintiff for the whole value of the flour; that the proceeds thereof may be applied in, or towards, payment of the draft; and that, if the value of the flour is found to be greater than the amount of the bill of exchange, the defendants may be ordered to pay the surplus to the plaintiff: though *Long*, and not the plaintiff, is entitled to the surplus if there was a sale by the plaintiff to *Long*. The terms of the paper signed by the plaintiff, and of the receipt signed by *Long* when he received the flour, as well as some other statements in the bill, seem also against the supposition of a sale. The fourth paragraph of the bill was relied on as sufficiently stating a sale to *Long*; but I think the statements of that paragraph are consistent with the supposition that the flour was consigned to *Long* for sale by him as a broker or an agent, though, except at the option of the Bank, the flour was not to be parted with until the price should be paid. And, on the whole, I am of opinion if the bill can only be sustained on the ground of a sale by the plaintiff to *Long* himself, that either that is not the case stated in the bill; or, that it is not stated with sufficient clearness, and that the bill is therefore bad for uncertainty.

Assuming that a sale to *Long* himself is not alleged, is there, notwithstanding, enough in the bill to defeat a demurrer?

In that view, the bill must be taken as representing that the plaintiff shipped the flour to the order of the

Bank of Montreal “for account of” *Long*; that he at the same time drew on *Long* for \$640; that he transferred this bill to the Bank, who discounted it; that he delivered to the Bank the carriers’ receipt for the flour, and entered into the agreement with the Bank as set forth by the paper signed by the plaintiff—in which it was stated that the plaintiff had indorsed the receipt to the Bank as collateral security for the payment of the draft; that he gave authority to the Bank to sell the flour, the proceeds to be applied to the payment of the draft; and authority to place the property in charge of any respectable broker or warehouseman for storage or sale, without prejudice to the Bank’s claim upon any party to the draft.

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Nothing is alleged as to the understood custom or course of dealing in such cases; and I presume, therefore, that no light was obtainable from that source as to the effect or meaning of the transaction.

Judgment.

On the hypothesis that there was no sale to *Long*, the flour, on his accepting the bill, would be a security to him, as well as to the Bank, for the payment of the bill; and considering, in connection with that circumstance, that the flour was consigned to the order of the Bank expressly for *Long*’s account, and that the draft was discounted, and the paper set forth signed, before *Long* accepted the draft—I think the fair construction to be put on the transaction is, that the Bank was to retain the possession of the flour until the draft was accepted, and was to have the power of retaining possession, if they chose, until payment; but that delivery to *Long* on acceptance, and before payment, was permissible (a). The bill

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(a) *Vide* Goodenough v. The City Bank, 10 U. C. C. P. 51. The Wisconsin Marine & Fire Ins. Co. Bank v. The Bank of Brit. N. A. 21 U. C. Q. B. 284. S. C. 2 Err. & App., 282.

1867. states that the plaintiff's intention was that the flour should remain in the legal possession and control of the Bank until the bill was paid : but his intention is immaterial, except so far as it was embodied in the agreement, or communicated to the Bank ; and there is no allegation of this object having been so communicated.

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Montreal.

It may be proper to add, that even if there was a sale to *Long*, and if the Bank had notice of the fact, I am by no means satisfied that I could come to a different conclusion as to the Bank's liability, in the absence of any direction on the subject from the plaintiff, and of any knowledge on the part of the Bank that (by the terms of sale, or otherwise) *Long* was not to have possession until payment.

**Judgment.** It was conceded by the plaintiff that, if his contention as to the liability of the Bank is correct, he has a remedy at law by action ; but it was said that, by reason of the damages to which he is entitled being unliquidated, the amount could not be set off at law. That is not alone a sufficient ground for coming to this Court (*a*). It was said that there was also an agreement for setting off the price of the flour against the note, and that such agreement is a sufficient ground for this relief in equity, if a set-off would not be allowed at law (*b*). I feel at present great difficulty in making out such an agreement from the bill ; for though, in case the Bank sold the property, they were to apply the net proceeds to the payment of the bill ; yet what the plaintiff desires to charge them with, is money that never came to their hands, but which, through negligence or misconduct, has been lost—a case

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(*a*) *Rawson v. Samuel*, C. & Ph. 178 ; *Glennie v. Imri*, 3 Y. & C. 436 ; *Stimson v. Hall*, 1 H. & N. 831 ; *Maw v. Ulyott*, 7 Jur. N. S. 1300 ; *Smith v. Wootten*, 12 Gr. 200.

(*b*) *Berry v. The Columbian Insurance Co.*, 12 Gr. 418.

not contemplated by the agreement ; and the agreement further provided that the taking of the flour as collateral security, and the authority to sell it, should not affect the rights of the Bank on the draft. On this point, however, it is unnecessary for me to express any decided opinion.

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There were some other objections urged to the frame of the bill, which I have not thought it worth while delaying my judgment in order to consider ; and I am not to be understood as intimating any opinion in regard to them. If the plaintiff is advised to amend his bill in other respects, these objections may be removed at the same time.

Demurrer allowed with costs. Plaintiff to be at liberty to amend.

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### ANDERSON V. KILBORN.

#### *Will—Mortmain Acts.*

A testator by his will directed all his estate, real and personal, to be sold, and out of the proceeds gave \$1,000 each to "The Rochester Theological Baptist Institution," and to "The American Baptist Missionary Union Society," and after the payment of these and certain other legacies, directed "all the remainder and residue of his estate to be distributed, at the discretion of his executors, to the support of Christianity throughout the world ; such as bible, tract, missionary societies and institutions of learning of the Baptist denomination." *Held*, void under the statutes of mortmain, so far as the same affected the realty.

This was a motion for decree declaring the devises by the testator of \$1,000 to "The Rochester Theological Baptist Institution," and to "The American Baptist Missionary Union Society," and of the residue of his estate after payment thereof, and certain other legacies

1867. to the support of Christianity throughout the world,  
 void as to the realty under the statutes of mortmain.

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 Kilborn.

By the terms of the will the two societies named were to receive payment of these sums if they should produce to the executors the promise of the testator for the same : to be paid in one year after his death.

The memorandum or promise referred to was in the following words :—“ I also give and bequeath to The American Baptist Missionary Union Society the sum of one thousand dollars for the purposes of the Union as specified in the Act of Incorporation, and I hereby direct my executors to pay said sum to the Treasurer of said Union, taking a receipt therefor, within one year after my decease. Dated at Clinton, Province of Canada, this seventeenth day of June in the year of our Lord one thousand eight hundred and fifty-seven.”

Judgment.

The will bore date the 2nd of June, 1857.

Mr. *Miles O'Reilly*, Q. C., for plaintiff.

Mr *S. H. Blake* for the executors.


Mr. *E. Martin* for the Missionary Union Society.

The bill as against the defendants The Theological Baptist Institution, was taken *pro confesso*.

VANKOUGHNET, C.—*Jacob Beam*, the testator, made his will in the following words :—

“ In the name of God, amen : I, *Jacob Beam*, of the Township of Clinton, in the County of Lincoln and Province of Canada, yeoman, calling to mind the uncertainty of human life, and knowing that it is appointed to all

men once to die, and being of sound mind and memory, do make and publish this my last will and testament in form and manner as follows:—First of all, I give and commend my soul into the hands of Almighty God, and my body to the earth, to be buried in a decent, Christian-like manner, at the discretion of my executors; and as it respects the worldly substance which it hath pleased God to bless me with, it shall be disposed of in the following manner:—

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“Second. I will and bequeath unto my beloved wife, *Maria Beam*, in lieu of all dower, \$1,000, now paid to her by a note against her son, *Daniel Moore*, and all the household furniture she brought to my place.

“Third. I will and bequeath unto The Rochester Theological Baptist Institution \$1,000, if they shall produce to my executors my promise for the same, to be paid in one year after my decease.

“Fourth. I will and bequeath to The American Baptist Missionary Union Society \$1,000, to be paid in one year after my decease, if they shall produce my promise for the same to my executors. Judgment.

“Fifth. I will and bequeath all my real and personal estate of every description to be sold at the discretion of my executors, hereby authorizing and requiring my executors to make deeds of all lands sold by them of mine.

“Sixth. I will that all notes, bonds, mortgages or agreements that are due at my decease, be collected (that can be collected) in a year after my decease.

“Seventh. I will all the remainder and residue of my estate, after paying the above named legacies, and all good and lawful claims against my estate, *shall be distributed at the discretion of my executors*, to the support of Christianity throughout the world, such as bible,

1867. tract, missionary societies, and institutions of learning of the Baptist denomination ; and that my executors retain so much in their hands as shall be to them a reasonable compensation for their time and trouble in the administration of my estate." And he appointed the defendants *Kilborn*, *Kitchen* and *Rott*, executors thereof.

Anderson  
v.  
Kilborn.

I am of opinion that the devises, so far as they affect the realty, to the Rochester Theological Baptist Institution, or to the American Baptist Missionary Union Society, are void. It is not shewn that these associations can hold land in this country, and land cannot be brought into mortmain here for the benefit of such associations situate abroad.

Judgment. Personalty may be bequeathed here to be invested in land in a foreign country, but land cannot be devised here to be turned into personalty to be used in a foreign country in support of a charity: *Curtis v. Hutton* (a), *McIntosh v. Townsend* (b), *Attorney-General v. Mill* (c), *Walker v. Denne* (d), *Soresby v. Hollings* (e), *Attorney-General v. Chester* (f). There was more room for argument in favor of the devise "to the support of Christianity throughout the world." I think these words must be read without the words immediately following, in order to determine the validity of the devise, for the latter words are merely indicative of the mode by which the testator thinks the main purpose of the devise, viz., "the support of Christianity throughout the world," can be promoted. It would be defeating this purpose if the whole fund could be devoted to one or two local institutions (if there be any such here) supporting in their narrow sphere Christianity, and authorized by law to take or hold land here for such an object; for, foreign bodies, as I have already

(a) 14 Ves. 537.

(b) 16 Ves. 330.

(c) 5 Bligh N. S. 596.

(d) 2 Ves. Jr. 170.

(e) 3 Ves. 50.

(f) 1 Br. C. C. 444.

said, cannot claim to have land here brought into mortmain. The testator's object was the application of the fund throughout the world, and I cannot cut down and defeat it by localising the fund. No doubt when the trustees of a testator's bounty can choose in their discretion a legal object, their right and their duty is to do so, although the testator sanctions also an illegal appropriation of the fund. This I held in *Anderson v. Dougall* (a). But here I do not consider that the executors have any such discretion confided to them, so as to confine the fund to any mere local institution—if there be any such entitled to take—and I therefore, as to it, refuse enquiry, treating the whole devise, so far as it affects the realty, as void.

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v.  
Kilborn.

Judgment.

# LEWIS V. PATTERSON.

*Will—Void devise to charitable uses—Residuary devise.*

A will contained a void devise of lands to charitable purposes, and then a residuary devise of the testators lands not thereinbefore mentioned or disposed of:

*Held*, that the property comprised in the void devise passed to the heirs at law.

This cause was heard at Hamilton, before Vice-Chancellor *Mowat*, at the sittings there in the autumn of 1866; when it was agreed that the question as to the construction of the will should be argued on a subsequent day at Toronto. This argument took place on the 14th of February, 1867.

Statement.

Mr. *Burton*, Q.C., for plaintiffs, the residuary devisees.

Mr. *Blake*, Q.C., for the defendants, the executors.

Mr. *Freeman*, Q.C., for the defendants, the heiresses-at-law.

Mr. *Proudfoot*, for other persons and corporations interested in a charitable devise contained in the will,

1867. not named as defendants, but who appeared by consent at the hearing, and agreed to be bound by the decree. *Page v. Leapingwell (a)*, *Doe Stewart v. Sheffield (b)*, *Hayden v. Stoughton (c)*, were referred to.

Lewis  
v.  
Patterson.

MOWAT, V. C.—This suit is for the administration of the estate of *John Bradley*, of the City of Hamilton, deceased. His will contained a devise of certain real estate to be sold, and the proceeds paid for charitable purposes to certain persons and corporations therein mentioned. The bill seeks a declaration as to whether the devise is void, and if so, whether the property passes to the heiresses-at-law, or to the residuary devisees.

All the parties to whom the proceeds were to be paid were represented at the hearing, and admitted that the devise could not be maintained.

The question then is, to whom the property so devised goes ?

The words of the residuary clause are these: "All the rest, residue, and remainder of all my estate and effects, real and personal, whatsoever and whensoever, not heretofore mentioned or disposed of." I have looked into all the cases cited, and some others (*d*), and am clear that the property comprised in the void demise did not pass under this residuary clause, but went to the testator's heiresses-at-law.

The decree will contain declarations accordingly, and the directions usual in administration decrees. Reference to Hamilton. Further directions and costs reserved. The decree will state the appearance by consent, as parties to this suit, of the persons interested, who were not named as parties in the bill.

(a) 18 Ves. 463.

(b) 13 East, 527.

(c) 5 Pick, 528.

(d) See *Garner v. Hannynnton*, 22 B. 630.

IN THE

COURT OF ERROR AND APPEAL.

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*[Before the Honorable the Chief Justice of Upper Canada, the Hon. the Chancellor, the Hon. the Chief Justice of the Common Pleas, Hagarty, A. Wilson and J. Wilson, JJ., and Mowat, V. C.]*

HUNT V. SPENCER.

*Oil Well—Vendor and Purchaser—Specific Performance—Independent covenants.*

The owner of vacant land leased part of it for nine months at a nominal rent. The lessees covenanted to sink on the land, during the term, a test well to the depth of 1000 feet, for the purpose of obtaining oil: and it was provided that at any time during the term the lessees should have the option of purchasing, and the lessor should convey to them, on their request, any five acres of the demised land at \$12 a lot; and that at the end of the term the lessees should have the option of purchasing the residue at the same price. The lessees did set about making the well, but the machinery broke after they had reached a depth of 530 feet, and they were in consequence unable to complete the well during the term, though they expended as much as, but for the accident, the well would have cost to complete; and the work had enabled the lessor to sell a large number of his other village lots at advanced prices. There was no charge of any want of good faith or diligence or skill on the part of the lessees. They gave notice, before the end of the term, that they would take the five acres.

*Held*, on appeal, affirming the judgment of the Court below, that the lessees were entitled to a specific performance of the covenant as to the five acres, notwithstanding the noncompletion of the well to the stipulated depth; without prejudice to any action by the lessor on the covenant.

This was an appeal from a decree pronounced by Vice Chancellor *Mowat*, on the 17th April, 1866, Statement.

1867.

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v.  
Spencer.

whereby it was declared that, under the indenture in the pleadings mentioned, the plaintiffs were entitled to exercise an option to become the purchasers of five acres of the lands in the said indenture mentioned, at the price or sum of \$12 per lot, and that, by the letter of *James Henry Flock* proved in evidence, dated the 14th day of February, 1866, they had well exercised their said option, and that they were entitled to a conveyance of the premises in the said letter mentioned, in fee simple, upon payment of the said sum, in case a good title could be made to the said premises. It was referred to the Master of the Court at London, to inquire and state whether the defendant *William Spencer* could make a good title to the said premises selected by the plaintiffs; and in case the Master should find that he could make a good title, it was further ordered that the Master should take an account of what was due to the said *William Spencer* for the purchase money of the said premises, and settle a conveyance of the same to the plaintiffs and their heirs, or to whom they should appoint, in which conveyance all proper parties were to join; and upon the plaintiffs paying to *William Spencer* the balance which should be certified to be due to him in respect of such purchase money, it was ordered that *William Spencer* should execute the said conveyance to the plaintiffs. And in case the Master should find that the said *William Spencer* could not make a good title to the premises, or in case the plaintiffs made default in payment of the purchase money, then the Court reserved the consideration of further directions and subsequent costs. The Court did not think fit to award to any of the parties, except to the defendants other than *William Spencer*, any costs of the suit up to the hearing, and the Master was directed to tax to the defendants, other than *William Spencer*, their costs of this suit up to the hearing, to be paid by the plaintiffs. The decree was declared to be without prejudice to the right (if any) of the said *William Spencer*

Statement.

to bring an action at law in respect of the alleged breach of contract on the part of the plaintiffs; and all parties were to be at liberty to apply to the Court as occasion might require.

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—  
Hunt  
v.  
Spencer.

From this decree the defendant *William Spencer* appealed for the following reasons:

1. Because although when the plaintiff's bill was filed the time limited by the indenture in the bill set forth for the sinking of a certain well therein mentioned had elapsed, and the plaintiffs had not performed their covenant in that respect, the Court of Chancery had not decreed the execution of the said covenant, and the decree therefore only enforces a partial performance of the contract between the parties.

2. Because the covenant on the part of the plaintiffs to sink the well in the said indenture mentioned, was a term of the contract between the parties of which a Court of Equity could not compel the execution; by reason whereof, the other terms of the said contract were also incapable of being enforced by a decree for specific performance.

Statement.

3. Because, inasmuch as the stipulations on the plaintiff's part contained in the indenture which comprised the contract between the parties, was not a proper subject for specific performance, there was a want of mutuality which disentitled the plaintiffs to have the execution of the appellant's covenant enforced by decree.

4. Because at the time of the filing of the bill there had been (as there still is) a failure of that which formed the consideration for the covenant of the defendant, enforced by the decree, inasmuch as the said well had not been sunk, and the time limited for the sinking thereof had elapsed.

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5. Because the plaintiffs, at the time of filing their said bill, were themselves in default in respect of their performance of the said contract, and by reason of their default the contract had become incapable of performance, inasmuch as the time limited for the sinking of the said well was in Equity material, and of the essence of the contract.

6. Because there is error in the decree, in treating the letter of *James Henry Flock* therein mentioned as a sufficient exercise of the plaintiffs' option to purchase the five acres therein mentioned.

7. Because, in other respects, it appears from the pleadings and evidence that the decree is erroneous, and that the plaintiffs' bill ought to have been dismissed.

Argument. Mr. *Strong*, Q. C., for appellant—The covenant of the lessees to sink the well was the consideration upon and for which the lessor covenanted to convey the land on the lessees declaring their option to purchase. The sinking the well was not, it is admitted, the consideration for the covenant by the lessor to convey, but the covenant to sink the well was clearly the consideration therefor. The plaintiffs have broken their covenant, and therefore have no right to call on a Court of Equity for its aid in enforcing their claim; they should therefore be left to any legal remedy they may have in respect to the covenant to convey. The decree as drawn up carries out the first proviso as to the lessees' right to enforce a conveyance on their declaring an option to purchase. Here the plaintiffs filed their bill after the time allowed for sinking the well had elapsed; they were therefore bound to show that they had fulfilled their agreement before they had any right to call upon *Spencer* for a specific performance of his part of the bargain.

The Court will not grant a decree for a part only of a contract, and if the plaintiffs are in default no relief will be afforded to them. *Fry* on Spec. Per., 270, 275, 279, 280. 1867.

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The principal, if not the only question here is : were the three stipulations, first, to sink the well, second, to convey five acres, third, to convey the whole, separate and independent contracts. These, though independent at law, yet under the circumstances appearing, equity will treat as parts of an indivisible contract ; the only consideration for the lessees covenant to sink the well was the right to purchase the land, and therefore must be treated as connected.

He also referred to *Lord Feversham v. Watson* (a) ; *Neale v. MacKenzie* (b) ; *Gervais v. Edwards* (c) ; *Stocker v. Wedderburn* (d) ; *Meredith v. Wynn* (e) ; *Cross v. Laurence* (f) ; *Fry* on Spec. Per., 237, 240, 821. Statement.

Mr. Blake, Q. C., for respondents—The appellant admits that immediately after the execution of the lease the respondents had a right to demand a conveyance of the five acres, upon paying the stipulated price. This establishes the point for which they contend, that the right to such conveyance was totally independent of, and unconnected with, the other portions of the agreement, as to sinking the well. This act was not a condition precedent to their right of purchasing the five acres. He referred among other cases to *Green v. Low* (g) ; *Dietrichsen v. Cabburn* (h) ; *Lumley v. Wagner* (i) ; *Gibson v. Goldsmid* (j).

(a) Rep. Temp. Finch 445.

(b) 1 Keen 474.

(c) 2 Dr. & War. 80.

(d) 3 K. & J. 393.

(e) 1 Eq. Ca. Ab. 70 pl. 15.

(f) 9 Hare 462.

(g) 22 Beav. 625.

(h) 2 Ph. 52.

(i) 1 D. McN. & G. 604.

(j) 5 D. McN. & G. 757.

1867. **MOWAT, V. C.**—This cause was heard before me at London, on the 17th of April, 1866; and I delivered judgment at the close of the argument, granting the plaintiffs specific performance as to the five acres, and refusing relief as to the remaining property specified in the lease. I was clear at the time that this was the proper decree, and did not deem it necessary to reserve judgment until I should have an opportunity of examining the authorities. The present appeal has given me occasion to look into these; and I remain of the opinion which I formed at the hearing.

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v.  
Spencer.

I shall state, first, the facts; and then, my view of the law applicable to them.

Judgment. The defendant, on the 15th of May, 1865, by indenture of that date, leased to the plaintiffs the west half lot No. 16, in the 2nd concession of the township of Plympton (except certain lots therein referred to), the same being part of the village of Wyoming. The demise was for nine months from the date of the lease; and the rent, one dollar, was to be paid on the last day of the term. Besides the covenants and provisoes usual in leases, the indenture contained the following: "The said lessees covenant with the said lessor, to sink, during the said term, upon the said premises, a test well to the depth of 1000 feet, for the purpose of obtaining oil. \* \* \* Provided always that, at any time during the said term hereinbefore demised, the said lessees shall have the option of purchasing in fee from the said lessor, and the said lessor will convey to them upon their request, any five acres of the said land hereby demised, upon payment of the sum of \$12 per lot, as laid out and surveyed as aforesaid. Provided, further, that at the end of the said term, the said lessees shall have the option of purchasing in fee, from the said lessor, all the hereinbefore mentioned lands (save and except the village lots, and parts and parcels of the said lands already sold and disposed of

by the said lessor to other persons as aforesaid, and the five acres above mentioned, should they be purchased during the term, and lots one and two aforesaid), at and for the price or sum of \$12 per lot, as laid out and surveyed in the said village as aforesaid, the same to be paid in two equal annual instalments, the first instalment in one year from the date hereof, and the remaining instalment in one year thereafter, with interest, at the rate of six per cent. per annum on the unpaid principal, at the time of each payment."

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The defendant intimates, in his answer, that the bargain was that if the plaintiffs should find oil in reasonably paying quantities at a less depth than 1000 feet, they were to be entitled to the benefit of the agreement.

The price per lot named in the agreement was less than the defendant had formerly obtained; but the saleableness of lots in the village had for some years been gradually declining, and was at its worst at the time of the agreement. The defendant appears to be the owner of other land adjoining the demised premises.

Judgment.

The plaintiffs received possession of the demised premises under the lease, and proceeded to sink the well agreeably to their covenant. Before the 7th of August (1865), a depth of 12 or 14 feet was drilled into the rock, and the work thenceforward proceeded until a depth of 530 feet was reached, when the bit broke. The plaintiffs did not then abandon the attempt to fulfil their covenant, but all their efforts, up to the time of the hearing, had failed to get out the bit (as sometimes happens in such cases), so as to enable them to resume the boring. The expenditure of the plaintiffs on the well has been between \$4000 and \$5000, which, if no accident had occurred, would have been sufficient to complete the well to the depth stipulated. There is

1867. no suggestion of any want of good faith, or diligence, or skill, on the part of the plaintiffs in their proceedings.

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There was a small show of oil at the depth of 350 feet, and a witness stated that he had known two instances of a well proving a fifteen barrel well where there was no greater show than here at 350 feet.

Judgment. The defendant's lots in the neighborhood of the demised premises have again become saleable, and prices have advanced. The cause of this was spoken of by two witnesses—one, a witness for the defendant, and the other, for the plaintiffs. The former (*William Gibbon*) said: "The rise has been from the discovery of more oil springs in the neighborhood. \* \* About the beginning of May, 1865, new oil wells were discovered about four or five miles from the property in question. There were other oil wells discovered previously. The greater briskness in the sale of lots commenced about three months since, I think." The witness for the plaintiffs on the same point (*Kemp*) said: "In the summer things took a rise, owing to the oil business. The increase has been a good deal owing to the plaintiffs' well. When people found there was a little show of oil prices began to rise." I think *Gibbon's* evidence corroborates this explanation of the rise, rather than contradicts it. The defendant appears to have sold a large number of his lots at the high prices since the plaintiffs' work commenced, and it is extremely probable, if not entirely certain, that his ability to do so has been owing to the plaintiffs' work.

On the 12th of February, 1866, being three days before the expiration of the term, the plaintiffs, through their agent, gave written notice to the defendant that they would take the five acres on the terms mentioned in the lease, and that they were prepared to pay the

purchase money as soon as the title was perfected. On the 14th of the same month, written notice was given to the defendant of the lots constituting the five acres which the plaintiffs wished to take; and they, on the same day, gave notice of their election to purchase the whole of the demised premises on the terms which the lease authorized.

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The defendant does not appear to have made any objection for some days to carrying out the sale, either of the five acres or of the rest of the premises; but he ultimately objected; and the ground of his objection, as appeared from his answer to the plaintiffs' bill, was, and is, that the plaintiffs had not sunk the well to the depth of 1000 feet, as contemplated by the lease.

In support of this defence reference was made by the learned counsel for the defendant to the rule of Courts of Equity, not to enforce an agreement in part, where it cannot be enforced wholly, and to the fact that the covenant to dig the well to the depth of 1000 feet within nine months had not been performed, and could not be enforced as against the plaintiffs even if the plaintiffs had made their election at an earlier period. Judgment.

The general rule is, no doubt, against enforcing part of a contract where the other part was from its nature incapable of being specifically enforced; but it is a rule which does not apply to a contract like this, where it is manifest that the parties meant that the digging of the well should not be a condition precedent to the right of purchasing the five acres: for the plaintiffs were to be at liberty to buy the five acres at any time during the term, and therefore the next day after the execution of the lease; while the plaintiffs had the full nine months thereafter to dig the well.

The effect of not having come for a specific perfor-

1867.

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Judgment.

mance until after the expiration of the nine months, I shall speak of hereafter, but would meanwhile remark that, apart from that circumstance, the case seems almost identical with one expressly put by Lord *St. Leonards*, in *Gervais v. Edwards* (a), as an example of those to which the rule does not apply. That case is often cited in support of the rule, which it states very distinctly. "By the rule of the Court, if I am called upon to execute the contract, I must myself specifically execute every part of it; I cannot give a partial execution of the contract." But he adds, "If a man agree to do a certain act: for example, to dispose of an estate, with a covenant for something to be done hereafter, the Court can carry such a contract into specific execution. The decree would give all that was presently contracted for—the immediate transfer of the estate itself, and compel the party to enter into the covenant to do the particular thing." In the present case the defendant has this covenant already, and meant and expected to have no more, as the condition of selling the five acres at the price named, if the plaintiffs should elect to buy; and the defendant has had, to a considerable extent, the advantage of the performance of the covenant.

Again, in *Gibson v. Goldsmid* (b), there was an agreement for a dissolution of partnership, and thereby, amongst other things, it was agreed that the defendant *Goldsmid*, and another, should make the assignment and enter into the covenants thereafter contained; and that, in consideration of their doing so, the plaintiff *Gibson* and another should jointly execute the indemnity thereafter set forth; and the defendant thereby assigned certain shares in two gas companies named, and covenanted for further assurance, and the plaintiff, in consideration thereof covenanted to indemnify the defendant in respect of the partnership debts and

(a) 2 Dr. & War. 80.

(b) 5 DeG. McN. & G. 757.

liabilities. The bill was for a specific performance of the covenant for further assurance, in order to vest in the plaintiff the shares in question. The defendant set up that the plaintiff was not entitled to this relief without being required specifically to perform the agreement on his part; that the defendant had been obliged to pay a partnership debt against which the plaintiff had, by the instrument containing the covenant for further assurance, agreed to indemnify the defendant, and he objected to perform the covenant for further assurance without being repaid the sum he had, through the plaintiff's default, been obliged to pay. The way in which this defence was dealt with, appears from the following language of the learned Judges. The Lord Justice *Knight Bruce* said: "Now, with regard to the indemnity which the defendant claims, he must, I conceive, be taken to have been, when they executed the deed, content to rely on the covenant of indemnity contained in the deed, and on the covenant only. The defendant alleges against the plaintiff, not any wrong upon his part previous to the deed or contemporaneous with it, but a wrong of commission or omission, done at a distinct or subsequent time, though in breach of a covenant contained on his part in the deed. This appears to me to form, neither legally nor equitably, an impediment in the way of the effectual assertion of his right to be placed in the position in which it was intended that he should, immediately upon the execution of the deed by himself and Mr. *Goldsmid* and Mr. *Grafton*, be placed; the plaintiff having done all that was then incumbent on him to do."

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Spencer.

Judgment.

The Lord Justice *Turner* said: "The true question, therefore, in this case, seems to me to be, whether, upon the construction of this deed, the covenant for further assurance and the covenant for indemnity, are to be taken as separate and distinct, or as connected together, so that the performance of the one was to be dependant upon the fulfillment of the other. I have

1867. examined the deed, in this point of view, and am fully satisfied it was not the intention of the parties that the covenants should be thus taken in connection.”

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These observations seem to me entirely conclusive. I can hardly imagine a case in which, in the intention of the parties, two covenants could be more separate and distinct, or the performance of the one more clearly not to have been intended to depend on the fulfillment of the other, than the covenant to sell the five acres at the price named, and the covenant to dig the well.

For other examples of a specific performance of parts of a contract, where the Court could not enforce performance of the whole, reference may be made to *Wilson v. The West Hartlepool Railroad and Harbor Co.* (a), *Dietrichsen v. Cabburn* (b), *Lumley v. Wagner* (c), and *Croome v. Lediard* (d), and to the cases referred to in the judgments in these cases.

Judgment.

Then, in view of the discretion which belongs to the Court in specific performance, does the fact of the plaintiffs not having completed the well within the time named, disentitle them to relief on a bill filed subsequently?

In considering this question, the facts to be remembered are, that, as already shewn, the completion of the well was not, according to the true meaning of the parties themselves, to be an essential preliminary to the right of purchasing the five acres; that the default in completing the well is not pretended to have been wilful, and is shewn by the evidence to have been the result of an accident beyond the plaintiffs' control; that the plain-

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(a) 11 Jur. N. S. 124.  
(c) 1 D. M. & G. 604.

(b) 2 Ph. 52.  
(d) 2 M. & K. 251.

tiffs had made considerable progress in the performance of their covenant when the accident occurred ; that they did their best to repair the accident ; that they have expended as much money on the work as the parties contemplated that the work would cost when completed ; that the defendant has had great benefit from this expenditure, and very possibly, or probably, all the benefit he would have derived from the actual completion of the well, as it is a mere chance whether oil would have been found in paying quantities ; that the plaintiffs, on the other hand, unless permitted to purchase the five acres, will lose their whole expenditure and get nothing whatever in return ; and that they are besides liable to an action on their covenant whether this bill succeeds or fails, and to such damages as a jury, under all the circumstances, might think just. Having reference to these considerations, I think that the accident which occasioned the plaintiffs' default is no bar to relief. In fact accident, instead of being a bar to relief, is in many cases an independent head of jurisdiction and ground for relief in equity (a).

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Judgment.

*Walker v. Jeffreys* (b), illustrates the doctrine of equity on the point under consideration. That was a bill for the specific performance of a covenant to renew a lease of mines. The original lease contained a covenant that the lessees should and would so work the mines that there should be no more thereof wasted or left for the support of the roof than should be absolutely necessary for the safety of the works ; and that all the mines should be fairly got and regularly worked, &c. The lessee was to pay a surface rent of £100 a year, and certain royalties for the mines and minerals. One defence to the bill was, that those under whom the plain-

(a) 1 Story Eq. Jur.

(b) 1 Hare, 341. (See *Holmes v. The Eastern Counties Railway Co.*, 3 K. & J. 675.)

1867. tiffs claimed had "forfeited their right to renewal by breaches of covenant, in not having so worked the mines that nothing should be unnecessarily wasted or left; and further, in having wilfully discontinued working the mines in and since the year 1815, whereby they have become wholly unprofitable to the lessor" In dealing with this point the learned Vice-Chancellor observed: "It is admitted that the mines are in fact 'drowned out'; but whether owing in any respect to the default of the lessees, either before or after the drowning, the evidence is silent. I incline to the opinion that, if the drowning of the mine be not attributable to any default on the part of the lessees, and if it is of the character the plaintiffs' argument supposes, this Court ought to give the plaintiffs their lease. \* \* \*

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Judgment. I take to be, that the party who asks the Court to enforce an agreement in his favor, must aver and prove that he has performed, or been ready and willing to perform, the agreement on his part. Where, however, the strict application of that general rule would work injustice, the Court will relax it. A breach of an agreement may have been committed for which a jury would only give a nominal damage. A breach may have been committed which a jury would consider as waived; and, if the party committing those breaches has substantially performed the other parts of the agreement, whereby, at his expense, the other contracting party has derived benefits under the agreement, a Court of Equity might fail in doing justice if it refused to decree a specific performance. But if it has been by the default of the plaintiffs that the beneficial interest of the defendants in the mines has been wholly destroyed or suspended, and if, as their counsel has admitted at the bar, the plaintiffs want the mines only to support and protect their buildings on the surface, and do not intend to work the mines whether able or unable to work them, I am satisfied I ought to refuse the decree which the plaintiffs ask."

There are in the books numerous cases of bills for the specific performance of an agreement to renew a lease, where the intended lessor set up breaches of covenant on the part of the intended lessee as a bar to relief; and the settled rule in such cases is, that the breach, to operate as a defence, must be clearly shewn to be such as, by the express terms of the lease, would have amounted to a forfeiture if the lease had been executed. And as Lord Chancellor *Campbell* observed in *Rankin v. Lay* (a), "It is not every breach that will be sufficient; it must be a serious, deliberate, wilful breach which works a forfeiture, and would render the lease void" (b).

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On the whole, therefore, I continue to think that, both in justice and by the rules of Equity, the plaintiffs were entitled to a specific performance of the agreement as to the five acres, but not as to the remainder, the parties having expressly put the two portions on a different footing, providing for the purchase of the five acres at a time when the well might not have been or could not have been completed, and postponing the option of purchasing the remainder until after the period when the well should have been completed. This postponement seems to have been for no other purpose than to make the sale of the remaining portion follow, in point of time, the performance of the plaintiffs' covenants.

Judgment.

Something was said by the learned counsel for the appellant as to the unreasonableness of the selection of lots made by the respondents. But no complaint of this kind was made when the selection was notified to the appellant; none is made by the answer to the bill; no foundation for such a complaint appears upon the evi-

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(a) 2 DeG., F. & J. at p. 73.

(b) See *Hill v. Barclay*, 18 Ves. 56; *Trant v. Dwyer*, 2 Bl. N. S. 11.

1867. dence; and the objection is not one of the reasons of  
 { Hunt appeal. Of course, therefore, the objection is out of  
 v. the question.  
 Spencer.

I am of opinion that the appeal should be dismissed, with costs.

DRAPER, C. J.—In addition to what had been stated by the learned Vice-Chancellor; His Lordship remarked, that the two cases of *Gervais v. Edwards* (a), and *Gibson v. Goldsmid* (b), shew that unless the agreement of *Spencer* to convey the five acres is immediately connected with, or dependant upon, the covenant of the other parties, the lessees, to dig the well, the latter having declared their option to purchase five acres, have a right to call upon the Court to decree specific performance of that part of the general agreement.

Judgment. See, also, *Wilson v. West Hartlepool Railway and Harbor Co.* (c); *Dietrichsen v. Cabburn* (d); *Lumley v. Wagner* (e); *Croome v. Lediard* (f), on the same point.

But the plaintiffs have not dug the well within the time required.

They certainly have made a *bonâ fide* commencement; they have been stopped in their progress by an accident apparently quite beyond their control, and they have, in boring 530 feet, and in endeavoring to overcome the obstacle which has hitherto checked their progress, expended a sum which is represented as sufficient to have completed their undertaking under ordinary and contemplated circumstances.. They have shewn no want of readiness and willingness to perform their part.

(a) 2. Dr. & Wav. 80.

(c) 11 Jur. N. S. 124.

(e) 1 DeG. McN. & G. 604.

(b) 5 DeG. McN. & G. 757.

(d) 2 Ph. 52.

(f) Myl. & K. 251.

They are still bound by their covenant to sink the well to the depth contracted for; and as the term within which this was to be done has expired, they are liable for the breach of it to the lessor, who, as the evidence seems to shew, has derived a considerable advantage from the plaintiffs' expenditure. Unless they get the relief prayed for, by a decree that the lessor shall convey the five acres to them, they lose everything—the lessor gains all that is to be gained. This ought not to be, unless the contract between the parties prevents any other more equitable result. See *Walker v. Jeffries* (a); *Rankin v. Lay* (b).

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Therefore, though the covenant to bore the well to the depth of 1000 feet has not been completed, it has not been a deliberate, wilful breach of covenant, but an accident, and, to the plaintiffs, a most unfortunate and expensive accident, and the consequences of which ought not to be extended beyond the plain intention of the parties as expressed in the lease. I do not feel pressed to the conclusion that it works a forfeiture of the right to purchase five acres, because they might have claimed the fulfilment of this undertaking on the lessor's part as soon as they entered and became possessed of the term. Judgment.

I think, therefore, the appeal should be dismissed with costs. The decree extends no farther than the purchase of the five acres; and, to the best of my judgment, the lessor's covenant to convey them is independent of the defendants' agreement to bore the well. There is a distinct and sufficient consideration to support the covenant to convey.

*Per curiam.*—Appeal dismissed with costs.

(a) 1 Hare 341.

(b) 6 Jur. N. S. 685.

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## FLOWER V. DUNCAN.

*Lease—Waiver of condition—Oil well.*

Two leases were executed between the same parties and to the same effect, except that the first lease was for twenty acres and the second for ten acres, parcel of the twenty: It was a condition of the leases that the lessee should commence digging for oil on or before the 1st of June, 1861, which he failed to do. On the 16th September, 1863, the lessor accepted from the lessee \$50, to be kept out of his share of the first oil obtained, and a memorandum to this effect was indorsed on the twenty-acre lease by the lessor, which instrument the lessor thereby declared that he considered valid. On the 30th November, 1864, another memorandum was indorsed on the same lease and signed by the lessor agreeing to extend the time of commencing work on the within lease until June, 1865. The lessor was until after this time beneficial owner of the property, and he subsequently sold the lot of which the ten acres were part; the purchaser having notice of the leases. On his subsequently obtaining a patent for the lot, the Court of Chancery decreed that the ten-acre lease, was binding on the patentee, and restrained him from bringing ejectment; and the decree was affirmed on appeal.

Statement.

This was an appeal from a decree of the Court of Chancery, pronounced by Vice-Chancellor *Mowat*, on the 13th April, 1866, declaring that a certain indenture of lease of ten acres of the east half of lot number 20, on the south side of the London and Chatham Road, in the township of Zone, in the County of Kent, made by *James Atwell*, in the pleadings mentioned, on the 8th November, 1860, and registered in the registry office of the said county, is a valid and subsisting lease, and is binding upon the defendant *Henry Duncan*; and that the defendant should forthwith permit the plaintiff to enter upon the said ten acres, conformably to the said indenture: and that a writ of injunction should issue restraining the defendant from taking any further proceedings on the judgment in ejectment in the pleadings mentioned, and from interfering in any way with the plaintiff's rights under the said lease; and that the defendant should forthwith pay to the plaintiff his costs of the suit.

The lessor, *James Atwell*, had, before the execution of the lease, purchased the property from the Crown, but the patent had not been issued. He executed two leases to the plaintiff on the same day—first, a lease for twenty acres of the lot, and then the lease mentioned in the decree for ten acres part of the twenty, in consequence of some doubt of the lessor's title to the other ten acres; but the lease of the twenty acres was not cancelled or intended to be. The leases were in the same terms except in regard to the premises demised, and were expressed to be given for the purpose of digging for and obtaining oil, and of erecting all necessary buildings required in connection therewith. The plaintiff was to give the lessor one-tenth of the oil he obtained, or its equivalent in money at the current market price at the wells; and bound himself to commence digging on or before the 1st June, 1861, and in default the lease was to be void. The plaintiff did not commence digging within the time stipulated, and further time was given on the 16th September, 1863, and the 30th Nov., 1864; and a memorandum of the agreement was on each occasion indorsed on the twenty-acre lease.

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v.  
Duncan.

Statement.

These memoranda are set forth in the judgment.

The lot was subsequently sold by the lessor, and the legal estate conveyed to the defendant.

From the decree above set forth the defendant appealed on the following, amongst other grounds: That the defendant was a purchaser for valuable consideration, without notice of the claim now asserted by the plaintiff on the ten acres in question in this suit, and as such, he is entitled to the protection of this honorable Court; that the only lease from *James Atwell*, the lessor to the plaintiff of which the defendant had any notice before the commencement of this suit, was the ten-acre lease which was registered, and which had become forfeited before the defendant's purchase by reason of the plaintiff's non-

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compliance with the terms thereof, and which lease is now null and void ; that the twenty-acre lease, on which the extensions of time were made [in so far as the ten acres are concerned] was surrendered, by operation of law, by the lease for the ten acres being subsequently given by the said *Atwell*, the two not being capable of existing together, and, consequently no extension of time for the performance of its terms could revive it as regards the defendant, the subsequent purchaser of the land contained therein ; that it appears by the evidence of *James Atwell*, the plaintiff's own witness, that the lease for twenty acres was put an end to when the lease for ten acres was given ; that even assuming there was a valid extension of the time for the performance of the terms of either lease, which would be binding on the defendant, the evidence shows that the same became forfeited on the first day of June, A.D. 1865, by reason of the non-compliance by plaintiff, with the terms thereof, no commencement of operations, within the meaning of the said lease, having been made on the land in question before the said first day of June, and that time is of the essence of the contract under which the plaintiff claims.

Statement.

In support of the Decree the plaintiff alleged the following grounds : That the allegations of the plaintiff's Bill of Complaint were completely proved, and it clearly appeared, by the evidence, that the defendant at the time of the purchase had actual notice of the plaintiff's rights, and, in fact, purchased subject thereto ; that the defence of being a purchaser for valuable consideration without notice, is not open to the defendant upon his answer ; that the lease for ten acres, the benefit of which is claimed by the plaintiff in this suit was shown to be in full force and effect at the time of the defendant's purchase ; that the question of the forfeiture of the said lease, by failure to commence operations, was not open to the defendant upon the pleadings, and that the evi-

dence showed that there had been a sufficient commencement of operations within the meaning of the said lease.

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Duncan.

Mr. *Strong*, Q. C., for appellant.

Mr. *Moss*, for the respondent.

The judgment was delivered by

VANKOUGHNET, C.—Two questions arise in this case.

1st. Was waiver by parol of the condition to commence work by a particular time sufficient? and if not,

2nd. Is there evidence in writing of such waiver?

As in my judgment there is evidence in writing of such waiver, it is unnecessary to consider the first question.

The vendor had made two leases of the same date—one for twenty acres of the land and the other for ten acres, parcel of the twenty. The reason for giving the second lease was that there was a doubt as to the lessor's and vendor's title to the other ten acres. The vendor swears that he considered the lease of the twenty acres so far binding on him that if his title to the other ten acres had been good, plaintiff could have claimed it, and so the whole twenty acres; and that this lease of the twenty acres was then given up. This would seem to be so from the receipt indorsed on it dated 16th September, 1863, which is as follows:

Judgment.

“Received, Cashmere, September, 16th, 1863, of Mr. *Theron A. Flower*, the within mentioned party of the second part, per *W. E. Gardner*, the sum of Fifty Dollars, to be applied as payment on lot number Twenty, part of which is held by the within instrument for obtaining oil, which instrument I consider valid, said amount

1867. to be kept out of my share of the first oil obtained by him from said premises; and in case no oil be obtained in paying quantities, to be collected as provided in a clause of the within lease for the purpose.

Flower  
v.  
Duncan.

JAMES ATWELL."

But whether so or not, both parties concurred in treating the lease of the twenty acres as covering the ten acres included in the second lease which, except as to the quantity of land, was identical with the other in terms. On the back of the twenty-acre lease, under date the 30th November, 1864, appears the following memorandum signed by the lessor, the defendant's vendor:—"I hereby agree to extend the time of commencing work on the within lease until June, 1865, and for the above extension of time the parties of the second part agree to pay to *James Atwell* the first ten barrels of oil obtained upon the territory this lease contains. .

Judgment.

"Township of Zone, C. W., November 30th, 1864.

"JAMES ATWELL."

"Witness, ORLANDO ALLEN.

Now, was this lease up to that time subsisting or not? If subsisting, it covered the ten acres in question. If not subsisting, had not the lessor set it up by this indorsement, at all events as to the ten acres. And in any case, does not this indorsement cover the land in question, and the work to be done on it, whether under this lease or any other lease? The work was not to be done on the lease, as expressed in the memorandum, but on the land covered by the lease, or embraced in it; and would not the Court, in furtherance of the conduct, acts, and intention of the parties, read the words (if critical accuracy of expression be necessary) as "on the lease of the within land"—in which case there could be no doubt, as any existing lease would then be affected by them.

We think the words sufficiently referable to the ten acres, whether held under the one lease or the other, and that the appeal should be dismissed with costs. 1867.

*Per curiam*.—Appeal dismissed with costs.

### GRACE V. MACDERMOTT.

A married woman owning land, she and her husband contracted for the sale thereof, but the deed executed to the purchaser was a conveyance by the husband only with a bar of dower by the wife. The error was not discovered until after the property had been disposed in parcels and passed into other hands. The original owner and her husband then executed for a nominal consideration a deed conveying the property absolutely to one of the parties interested, but under the belief that the only effect of such second deed was to remove the defect in the first deed, and to confirm the title of all parties claiming thereunder. On a bill by one of these parties and the grantor (the husband being dead) Vice-Chancellor Esten decreed the grantee in the second deed to be a trustee for all the parties interested, and this decree, on appeal, was affirmed with costs.

This was an appeal from a decree pronounced by the late Vice-Chancellor *Esten*, dated 9th July, 1864, whereby it was declared that the defendant *Henry MacDermott*, was a trustee for the plaintiff *William Esmond Grace*, and for the defendants *Alexander T. Montgomery*, *John Stanley Keeling*, *William M. Wilson*, and *David Rowe*, respectively, of the premises conveyed to him by an Indenture of the 8th of October, 1860, in the pleadings mentioned according to the apparent estates and interest of the said above named plaintiff and defendants in the said premises, under the several indentures in the pleadings mentioned, in like manner and to the same extent as if the original indenture of the 7th day of November, 1847, in the pleadings mentioned, had passed the fee simple of the premises to the defendant *William Mattheson*, the grantee therein

Statement.

1867. named ; and decreed the said defendant *Henry MacDermott*, by proper instruments to assure and convey to the plaintiff *William Esmond Grace*, and to the said defendants *Alexander T. Montgomery*, *John Stanley Keeling*, *William Henry Wilson*, and *David Rowe*, respectively, the estates and interests in the said premises, whereof he is hereby declared to be a trustee for them respectively, such instruments to be settled by the Master of this Court in case the parties differed about the same, and to be executed upon tender thereof to the said *Henry MacDermott*.

Grace  
v.  
McDermott.

The Court ordered that the bill should be dismissed against certain other defendants *John McDonald*, *William Hyslop*, *Christopher Crabb*, and the *Bank of Upper Canada*, and that the said defendant *Henry MacDermott*, should pay to the plaintiffs their costs of this suit, to be taxed by the said Master.

The facts appear sufficiently in the judgment of the Court.

Mr. *Roaf*, Q. C., for the appellant.

Mr. *Blake*, Q. C., for respondent.

The judgment of the Court was delivered by

Judgment. RICHARDS, C. J.—The facts disclosed in the proceedings in the Court below are to the following effect:—The plaintiff *Mary Gale*, the wife of *Robert Gale*, prior to the 9th November, 1847, was seized in fee of thirty-five acres of the rear part of lot number six in the Maitland Concession, in the Township of Goderich. She and her husband had agreed to sell it to *William Mattheson* for a valuable consideration, and employed a professional gentleman to prepare the conveyance. Through mistake the deed, instead of being drawn to convey the

estate of *Mary Gale*, merely conveyed the estate of her husband, and purported to release the dower of *Mary Gale*. This deed was executed on the 9th November, 1847, all parties then believing it was a valid conveyance of the land, and of *Mary Gale's* interest in it; and she acknowledged before two magistrates when examined by them apart from her husband that she gave her consent freely and voluntarily to the conveyance, &c. The deed was registered, and *Mattheson* went into possession.

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On the 29th July, 1853, *Mattheson's* interest in the land was sold under an execution at law, and was purchased by *Alexander Montgomery*, and conveyed to him by the Sheriff making the sale, and *Montgomery* entered into possession of the land.

*Montgomery* afterwards sold twenty acres of the land to *William Hyslop*, 2nd December, 1856. *Hyslop*, on 10th August, 1858, sold and conveyed to *Montgomery* the twenty acres, and *Montgomery* on the same day gave back to *Hyslop* a mortgage to secure £275. On 29th December, 1860, *Hyslop* sold and assigned to *Christopher Crabb* the principal and interest due on the mortgage of *Montgomery* on the twenty acres of land, together with the power of sale, &c., contained in the mortgage.

On the 17th August, 1859, *Montgomery* mortgaged to *Keeling*, the north part of lot six, to secure the payment of £1000. On 21st December, 1859, *Keeling* assigned all his interest in that mortgage, and the lands which purported thereby to be conveyed, to *Wilson* and *Rowe*.

On the 14th February, 1860, *Montgomery* conveyed to *Keeling* all his right, title and interest in the whole of the thirty-five acres; and on the same day *Keeling*

1867. mortgaged his whole interest in the land (thirty-five acres) to *Montgomery* to secure £1,316 16s.

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On 29th February, 1860, by another mortgage, *Keeling* mortgaged his estate in the thirty-five acres to secure \$1,187 to defendant *MacDermott*. Subsequent to this time *MacDermott* discovered the defect in the title.

At the time this discovery was made, the interest of the parties in the land supposing the whole estate had passed by, the deed to *Matheson* would have been as follows :

*Crabb*, as assignee of mortgagee of south part twenty acres to secure £275 and interest; *Wilson* and *Rowe* as assignees of mortgagee of north part, say fifteen acres, to secure £1000; *Montgomery* having conveyed to *Keeling* all his interest in the thirty-five acres, by mortgage from *Keeling*, was mortgagee of the whole estate subject to the mortgage which *Crabb* then held of £275 and to the one, *Wilson* and *Rowe* held of £1000; and *MacDermott* was mortgagee of the whole estate subject to the same incumbrances that *Montgomery* was amounting to £1,275, in round numbers; and to the mortgage to *Montgomery* of £1,316 16s.

Judgment.

After the defect in the title was discovered, it was arranged between the defendants *MacDermott* and *Hyslop* who was then interested in the mortgage from *Montgomery* to him of the twenty acres, that *Hyslop* should endeavour to procure a deed of the land from Mr. and Mrs. *Gale*.

Up to this time there is no substantial difference in the statements of plaintiff and defendants, but here there is an important difference. The defendant *MacDermott* says the arrangement was that *Hyslop* should

obtain the conveyance to him *MacDermott*, and that then he would give *Hyslop* a mortgage on the twenty acres to make him secure as to his claim.

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On the contrary, *Hyslop* declares he never consented to the arrangement, but insisted that the deed which *MacDermott* was to prepare should be made to *Montgomery* which would have the effect of confirming the title of all the parties. The deed actually executed was to *MacDermott* and not to *Montgomery*. It was prepared by *MacDermott* and given to Judge *Cooper* who was, as Judge of the County Court, to see Mrs. *Gale* execute the deed. *Hyslop* states that it was executed by Mr. and Mrs. *Gale* supposing it was a deed to *Montgomery*. As to this there may be some dispute.

But the evidence establishes clearly, I think, that Mr. and Mrs. *Gale* both executed the deed in order "to make right the title to *Montgomery*," and they considered by doing so she was confirming a title she had made before. Judge *Cooper* said he knew the deed was to *MacDermott*. "All I recollect is that it was said that what was doing was to confirm the old *Montgomery* title, or words to that effect. *Montgomery's* name was mentioned. \* \* It was understood she was confirming an old title, and hence she did not require a substantial consideration. All I knew was from the conversation I had with Mrs. *Gale*, and the conversation between *Hyslop* and Mrs. *Gale*; my impression was that the object was to rectify a defect in some former conveyance made by Mrs. *Gale*; she said she could have no objection. I understood she was willing to rectify the defect in the former conveyance for a nominal consideration. They understood that what she was doing was to rectify that defect. Mrs. *Gale* did not understand as far as I saw that she was making a deed that would cut out any title under a former conveyance. Her intention, as I understood it, would have been defeated by cutting out any one. She

Judgment.

1867. wanted to put parties in the same situation as if the former deed had been correct. She wanted to do what was honest. \* \* \* I thought the deed was to rectify the defect in the old title. \* \* \* She and all of us understood she was rectifying the old defect.”

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MacDermott.

In this way and with these views, and under these representations, Mr. and Mrs. *Gale* executed the deed to *MacDermott*. Mrs. *Gale* was paid four dollars by *Hyslop*. *MacDermott*, in his answer to the bill as amended, as I understand the effect of the pleadings, contends that plaintiffs shew no equity entitling *Grace* to the relief prayed, and that the validity of the deed from *Gale* and wife, or the manner in which it was obtained, cannot be called in question at the instance of the plaintiffs; and that the plaintiffs not having had any interest in the property in question when the deed was executed, are not entitled to have the same set aside, nor to have any releif against him in the premises.

Judgment.

After the bill was amended, I presume it was in the power of the defendant *MacDermott* to have submitted to the Court that he was willing to convey the land or hold it according to the understanding on which the conveyance was made to him, though at the time it was executed the representations proven to have been made as to the object of executing it were not known to him. If he had done so the Court would then have considered whether they would have amerced him in costs, but instead of doing this, he still asserts his right to maintain the deed and his absolute interests under it. If he has not that right, and the Court so decide, he ought to pay costs.

If this deed is allowed to stand as conveying the estate of Mrs. *Gale* to *MacDermott* absolutely, then this result follows: that for a merely nominal consideration (four dollars) *MacDermott* is to acquire property to the

value, as I understand, of over £1,600. Mr. and Mrs. *Gale* having conveyed it for the nominal sum on the express understanding and representation that the conveyance they were then executing was making good the title they had formerly made of the premises. If this conveyance is allowed to stand without making good that title, a gross fraud surely will be perpetrated on Mrs. *Gale*; and Mr. *MacDermott* will be reaping the advantage of that fraud. This state of things ought not to be allowed to prevail, and the Court will struggle against any mere technical rule or objection that would prevent the doing of that which appears just and right in this matter.

1867.

Grace  
v.  
McDermott.

The conveyance by *Gale* to *Mattheson* not being, nor purporting to be, a conveyance of the wife's interest in the land would, I apprehend, transfer the life estate of *Gale* if he had had children by his wife, or the estate for the joint lives of himself and wife to *Mattheson*. The deed would not seem to be void as it undoubtedly would have been if she had been executing it as a deed by which she was assuming to grant her estate; this is the result of the decided cases. It has also been determined that the husband himself may grant the estate which he has in right of his wife, and that his grant will pass the estate notwithstanding our statute. The conveyance referred to, I understand, only purports to be a grant of the estate by *Gale*, the husband, and I think the fair construction of the instrument is that it is only the deed of the husband for the purposes of the statute. *Allan v. Levisconte* (a), *Doe McDonell v. Twigg* (b), *Doe Dibble v. Ten Eyck* (c), *Wallis v. Burton* (d).

Judgment.

If this be the effect of the deed, then to the extent at least for the period of the joint lives of Mr. and Mrs.

(a) 15 U. C. Q. B. 9.

(b) 5 Ib. 167.

(c) 7. Ib 600.

(d) Ante Vol. 5, p. 352.

1867. *Gale*, the estate in the lands passed to *Mattheson*, and through him to other parties, and this estate became vested in the parties referred to as having title under the conveyances from *Matheson* down to the time of the execution of the second deed by *Gale* and his wife.

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McDermott.

*Grace*, then as a purchaser under the mortgage that had been assigned to *Crabb*, had an interest in the twenty acres of land, though certainly not of so valuable a character as he would have had if the deed to *Mattheson* had passed the whole estate of Mrs. *Gale* to him. In this view *Grace* is not a person only clothed with a mere right to bring an action, and is not barely the assignee of a chose in action which he is now endeavouring to enforce. He has a *locus standi* as possessing an interest in the estate which he wishes to perfect.

Judgment. I do not consider that *Grace* is brought within the rule laid down in *Prosser v. Edmonds* (a), referred to by Mr. *Roaf* even if he had no interest in the land save what he might be considered as having obtained by the purchase of what has been said to be a mere right of action in reference to the facts of this case. In that case the person defrauded expressly refused to become a party to the suit, but here Mrs. *Gale* is such party and is a plaintiff.

If we take the analogy of the cases at common law, the assignee of a purchaser may bring an action for defect of title when the estate does not pass by the deed, the action being brought by the assignee in his own name on covenants running with the land, a complete breach occurring when the land was in the possession of such purchaser (b).

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(a) 1 Y. & C. Ex. C. 481.

(b) *Kingdom v. Nottle*, 1 & 4 M. & S. and the cases subsequent thereto.

Can it be doubted that *Grace* could have brought an action against *Montgomery* on the covenant for seizin if his deed contained such a covenant; though in fact if nothing passed by the deed from *Gale* and wife to *Mattherson*, neither *Montgomery* nor any claiming under him were seized of a good and perfect estate in fee simple.

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Grace  
v.  
McDermott.

If *Grace* could have sued *Montgomery* at law for this defect of title on the covenant which passed to him with the land, or the possession of the land, why has he not a *locus standi* to take these proceedings in equity to enforce his title. As far as that objection goes, I think *Grace*, with Mrs. *Gale* joined as a party in the bill, certainly is in a position to enforce equitable rights so far as having an interest in the subject matter of the suit is necessary for that purpose.

I think the authorities clearly shew that a subsequent mortgagee may clothe himself with an outstanding legal title and thereby cure any defect in his own title, and even in this way cut out any prior incumbrance to his own provided the holder of the legal estate is not a trustee for the benefit of all the incumbrancers. I have no doubt Mr. *MacDermott* might have purchased the interest of Mr. and Mrs. *Gale* in the land in question, if no false representations had been made to them, or no fraud had been practised on them, and he would have been allowed to retain the legal title and cut out the parties prior to himself as mortgagees. The ground upon which he is interfered with is, that he has not procured such a title; and that the deed is now set up in fraud of the express purposes for which it was made.

Judgment.

Another objection to the plaintiffs' recovery, as I understand it is, that *Gale* and wife appear to have conveyed to *Montgomery*, and therefore Mrs. *Gale* has no interest in the matter. The nature of the conveyance to *Montgomery* is not set out—it may contain

1867. covenants for title, and she may in that way be interested in it, though perhaps not bound by the covenants herself, her husband's estate may be and she may be interested in that. *Montgomery* himself is a party to these proceedings, and he does not object to the decree which in effect accomplishes the same thing as a conveyance of the estate to him would, provided the conveyance made by him would operate by way of estoppel.

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v.  
McDermott.

*Per curiam*.—Appeal dismissed with costs.

### GRANT V. BROWN.

*Specific performance—Parol contract.*

On an appeal from a decree of the Court below for specific performance of a parol contract, it appeared that the defendant denied that there was any contract for sale, and alleged that the plaintiff was in possession as tenant merely and not vendee; that the contract sworn to by the plaintiff's witnesses was not the contract alleged by the bill, and the evidence of there having been any contract was contradictory; and that the learned Judge who pronounced the decree had intimated considerable doubt as to the evidence, the decree was reversed, and the bill in the Court below ordered to be dismissed, but under the circumstances without costs.

Statement. This was an appeal by the defendant from the decree pronounced by Vice-Chancellor *Spragge*, as reported *ante* vol. xii., page 52.

Mr. *Strong*, Q.C., and Mr. *McCrea*, for the appellant.

Mr. *Blake*, Q. C., and Mr. *Atkinson*, for respondent.

*Gwillen v. Halsey* (a), *Wills v. Stradling* (b), *Frame v. Dawson* (c), *Exp. Hodgson* (d), *Morphett v. Jones* (e), *Thyme v. Glengall* (f), *Reynolds v. Waring* (g), *Mor-*

*timer v. Orchard (h), Rice v. O'Connor (i), Bond v. Hopkins (j), Clinan v. Cooke (k), Lindsay v. Lynch (l), Stuart v. The London, &c., Railway Co. (m), Taylor v. Portington (n), O'Brien v. Osborne (o), Mundy v. Joliffe (p),* were with other cases referred to.

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Grant  
v.  
Brown.

The judgment of the Court was delivered by

VANKOUGHNET, C.—The doubts expressed in this case by my learned brother *Spragge*, and a contrast of the evidence with the statement of the contract set up by the bill, have led me to the conclusion that it will not be safe to give the plaintiff relief however hard it may be on him to refuse it.

This is one of those unfortunate cases in which parties trusting to one another's good faith, have not reduced their agreements into writing. In the case of *Nicol v. Tackaberry*, I explained how I thought the doctrine of part performance had originated in England; and in subsequent cases I have again and again expressed the opinion that, while this doctrine is too firmly rooted in our system of law to be disregarded, yet that in this country and in this age, the man who neglects to reduce his bargain to writing is guilty of a great wrong to himself, or hopes, after a lapse of time, by the testimony of frail memories to inflict a wrong upon his neighbour whom he seeks to bind; and that in either case he cannot complain if the Court refuses to execute his alleged bargain, unless he has clear evidence of it,

Judgment.

(a) Amb. 586.

(c) 14 Ves. 386.

(e) 1 Swans 172.

(g) Young, 346.

(i) 11 Ir. Ch. 510.

(k) 1 Sch. & Lef. 22.

(m) 1 D. M. & G. 721.

(o) 10 Hare 92.

(b) 3 Ves. 378.

(d) 19 Ves. 206.

(f) 2 H. L. 158.

(h) 2 Ves. Jr. 243.

(j) 1 Sch. & Lef. 413.

(l) 2 Sch. & Lef. 1.

(n) 7 D. M. & G. 328.

(p) 5 M. & Cr. at p. 177.

1867. and its terms are made clear. The arrangement here, it is true, took place between the plaintiff and defendant five-and-twenty years ago; but it does not appear that either of the parties was an ignorant man, or that then or at any time afterwards there was any impediment or difficulty in the way of reducing their bargain to writing. The plaintiff does not even allege that he was ignorant or was imposed upon. He trusted to the defendant's promise; and if he could make it clear what that promise was, I think he would be entitled to specific execution of it, for his enjoyment of the property, as proved, at once raises the presumption that he was in as owner; and no other arrangement is proved. The mere allegations of the defendant cannot displace that presumption, else it could, in any case, be got rid of by such means, or by a mere speculation that the party was in as tenant or under a bargain to clear and improve land, or on any other terms, which, if proved, would of course remove the presumption in his favour. But a great difficulty here is that the plaintiff sets forth a bargain which he does not prove, and that the defendant denies that there was any such bargain at all.

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v.  
Brown.

Judgment.

The plaintiff must be taken to know, if any one can know, and he surely must know better than the Court can ascertain for him, what his verbal bargain with the defendant was. The plaintiff says that "on his improving a *reasonable portion* of the said two hundred acres of land, he was to have his choice of either half." The only witness to the bargain—the plaintiff's son, *William Grant*—says that his father "was to come out and work on the lot and clear it." Now clearing a lot, and improving a reasonable portion of it, are two very different things. It might be said, "then let the plaintiff have the lot upon the terms stated by his son, as they are the most burdensome to him." This might perhaps be acceded to, were the case otherwise free from doubt. But here we have the plaintiff and his

witness differing as to the terms of the bargain: we have the defendant on oath denying that there was any such bargain at all; and we have a conflict of evidence justly exciting great doubts in the mind of the learned Judge who heard it, whether the plaintiff really considered himself as the owner of the property, or entitled to it by any bargain, and whether his conduct was not inconsistent with his now pretension. Under these circumstances we think it safer to refuse relief; but looking at the long undisturbed enjoyment of the property by the plaintiff, and considering, as we do, that there was some bargain which cannot now be clearly defined, we think there should be no costs.

1867.

Grant  
v.  
Brown.

### McKENZIE v. YIELDING.

#### *Specific performance.*

The plaintiff was lessee of some ordnance lands, and assigned his interest therein to the defendant in 1847, the latter agreeing in consideration of such assignment to pay off an execution against the plaintiff, then in the Sheriff's hands; and if the Ordnance Department would give the defendant a deed in fee of the lot or a lease renewal in perpetuity at the then rent, to release a mortgage he had against the plaintiff on other land. The Department refused to do either, but eleven years afterwards sold the land to the defendant at a price greatly exceeding the sum of which the rent would be the interest at six per cent. The bill was for the discharge of the mortgage, and the decree of the Court below dismissing the bill was affirmed on appeal.

This was an appeal from the decree of the Court of Chancery, pronounced by Vice Chancellor *Spragge*, which is reported ante Volume XI., page 446.

Statement.

The agreement which was the subject of the suit was as follows:—

“Articles of agreement made the tenth day of

1867. August, in the year of our Lord one thousand eight hundred and forty-seven, between *Agar Yielding*, of Bytown, in the District of Dalhousie and Province of Canada, farmer, of the one part, and *Duncan McKenzie*, of the Township of Gloucester, in the said district, yeoman, of the other part, witnesseth, that the said party of the one part hereby covenants with the said party of the second part, that for and in consideration of an assignment made by the said party of the second part to the said party of the first part, of the west half of lot letter A. in the second and third concessions from the River Rideau, in the said Township of Gloucester, he the said party of the first part will pay off an execution now in the hands of the Sheriff of the said district, against the goods and chattels of the said party of the second part, and if further, the principal officers of Her Majesty's Ordnance will give to the party of the first part a deed in fee simple, or a lease perpetually renewable at the present rent, he, the party of the first part will discharge and release a mortgage in favor of the party of the first part, on lot number eleven in the Gore of the Township of Gloucester. In witness whereof, the said parties of the parts aforesaid, have hereto set their hands and seals the day and year first above written.

McKenzie  
v.  
Yielding.

Statement.

“AGAR YIELDING. [L. s.]

“Signed, sealed and delivered in presence of

“CHARLES ROBINSON.”

From the decree then drawn up the plaintiff appealed on the following, amongst other grounds:—

That the true agreement between the appellant and respondent was, that in the event of the respondent either purchasing or obtaining a perpetual lease of the west half of lot letter “A,” in the second and third concessions of the River Rideau, in the township of

Gloucester, the said respondent would discharge the mortgage on lot number eleven in the Gore of the Township of Gloucester; that it appears from the evidence and depositions, that the said respondent was, in either of the events aforesaid, to discharge the said mortgage; that the true construction of the agreement of the 10th day of August, 1847, is that, in either of the events aforesaid, the respondent was to discharge the said mortgage; that it appears that the only other consideration the respondent gave for the assignment to him of the lease of the west half of lot letter "A," was the payment of the execution, and the payment made by him upon such execution was deducted from the purchase money of the land, besides the rents and profits of the same, which he had received several years, and that therefore the respondent, in fact, gave no consideration for the assignment of the said lease; that in any event, the respondent, under the circumstances, would be a mortgagee of the west half of lot letter "A," and that the appellant would be entitled to redeem him, and to an account of the rents and profits received by him during the time he had the said lease; that it appears that the west half of lot letter "A," at the time of the said assignment, was worth much more than the sum of £80, and therefore, and from other facts and circumstances, that it is clearly shewn or must be presumed that the respondent agreed to discharge the mortgage upon the happening of either of the events aforesaid; that it is not shown that the respondent was to discharge the mortgage only in the event of being able to purchase the land at the sum of £80, or obtaining the perpetual lease at the rate aforesaid; that the learned judge who heard the case partly construed the meaning of the said agreement upon oral testimony of facts which occurred long subsequent thereto, whereas he should have construed the same according to the terms thereof, or at all events should only have admitted oral testimony in explanation thereof of facts and circumstances which

1867.

McKenzie  
v.  
Yielding.

Statement.

1867. *ranspired at the time of the execution of the said agreement ; that it is against law and equity and unconscionable to allow the respondent to reap so much profit and benefit from the said half lot, and still to retain the mortgage debt—and the said respondent is not a purchaser for value.*

McKenzie  
v.  
Yielding.

Mr. *M. C. Cameron*, Q. C., and Mr. *Fitzgerald* for the appellant.

Mr. *Moss*, contra.

*Townshend v. Stangroom (a) ; Neap v. Abbott, (b) ; Wood v. Scarth, (c) ; Harnett v. Yielding, (d) ; Gould v. Hamilton (e)*, were referred to.

Judgment. VANKOUGHNET, C.—If the agreement set out in the bill is to be literally construed, then it is clear that the plaintiff is not entitled to call upon the defendant to abandon his claim on the mortgage. This he, the defendant, only agreed to do in the event of Her Majesty's Officers of the Ordinance Department giving him a deed of the land, or a lease renewable at the then rent. Her Majesty's Officers did neither the one thing nor the other. They refused him a lease perpetually renewable—and they did not give, *i. e.*, make him a present of a deed—but they sold him the land at a large price, exceeding by at least \$700 the sum which at six per cent. interest per annum, would produce a capital yielding £4 per annum, the rental at the time of the agreement. Looking at the agreement however with the eyes of common sense as expressing what the parties meant, can it really have intended anything more than that if the defendant got a perpetual lease at £4 a year, or a deed in fee simple for a sum which, at simple interest,

(a) 6 Ves. 328, 333.

(c) 2 K. & J. 333.

(e) 5 Gr. 192.

(b) 1 C. P. Coop. 333.

(d) 2 Sch. & L. 354.

would produce that annual product, he would then release the mortgage? I think the plaintiff cannot contend for any other construction, as unless a free gift of the land, or a deed of it on the terms last suggested be the true meaning of the contract its terms would be too ambiguous for a Court to enforce. It never could be held that the defendant was to release the mortgage however large the sum he might pay for the land. The evidence shews that the parties contemplated at the time a purchase by the defendant, at the price already referred to, and the conduct of the defendant subsequently shews that he, at all events, was not mistaken as to this being the true understanding.

1867.

McKenzie  
v.  
Yielding.

We are of opinion that this appeal must therefore be dismissed with costs.

### McFARLANE v. DICKSON.

#### *Specific performance—Parol contract.*

A contract was entered into for a lease, and the intended lessee on the faith thereof entered into possession, paid rent, and made improvements. Both parties died without executing any writing stating the bargain and before any dispute as to the same arose. On a bill by the representatives of the intended lessee for specific performance the parol evidence was not alone sufficient to establish clearly the terms of the transaction; but there being found among the papers of the intended lessor, (a County Court Judge,) an unexecuted lease in his own hand-writing, the Court was satisfied that this paper contained the terms of the lease bargained for; and a specific performance having been decreed in Chancery, the decree was affirmed on appeal.

This was an appeal by the defendants from a decree of the Court of Chancery.

Statement.

The bill was by the executors of *Donald McFarlane* against the representatives of *George B. Hall*, Esquire,

1867. deceased, who at the time of his death was, and for some years previously had been, Judge of the County Court of Peterborough, for the specific performance of a contract for a lease.

McFarlane  
v.  
Dickson.

The cause was heard before Vice-Chancellor *Spragge* in the spring of 1864, who in decreeing specific performance of the alleged contract, pronounced judgment as follows :

There are some facts in this case as to which there can be no dispute. The late Judge *Hall* of Peterborough, being the owner of water power on the River Otonabee, sufficient to constitute several "water privileges," made agreements with some persons, four or more, among them the late *Donald McFarlane*, to grant leases for terms of years upon certain terms in regard to mills and machinery of various kinds which were to be put up by the tenants. It was agreed that *McFarlane* should put up an oatmeal mill. He went into possession of the premises, the subject of the agreement, and did, in or about the year 1848, put up an oatmeal mill thereupon, with the full cognizance and approbation of Judge *Hall*. A paper in the handwriting of Judge *Hall*, dated the            day of            1850, purporting to be a lease from Judge *Hall* to *McFarlane*, is proved to have been found among the papers of Judge *Hall*. Both he and *McFarlane* are dead. The point of commencement of the premises described in this paper, is "the north-west corner of the oatmeal mill erected on the said piece of land," the term is made to commence from the 1st of January, 1849, and is for twenty-one years, determinable upon notice by either party at the expiration of fourteen years, upon certain terms. This paper is unexecuted. So far there is no question as to the facts.

Statement.

The plaintiffs, who are devisees under the will of

*McFarlane*, contend that this paper is in its terms such a lease as was to be executed by the parties. (The bill states that the lease was to be determinable at seven and fourteen years, but that is immaterial). The defendants contend that the paper is not evidence of any lease or agreement for lease. It would be difficult, perhaps, to make anything out of it, if we had nothing but the bare fact of its being found among Judge *Hall's* papers; but we have very material evidence in regard to it. *Donald McKellar*, a brother-in-law of *McFarlane's*, proves that a lease, whether executed or not, he cannot say, was in the possession of *McFarlane* in 1852, he thinks; he describes it so as substantially to answer the description of the paper produced, except that he says it was determinable at seven and fourteen years; and he says that in that year Judge *Hall* called at *McFarlane's* store; that *McFarlane* was ill at the time; that Judge *Hall* asked *McKellar* to tell *McFarlane* to go his, the Judge's place, and to take the lease with him; that he told this to *McFarlane*, who the next day went to the Judge's place. I think it is an inference, which as a judge of facts I may properly draw from what is proved, that the paper produced from Judge *Hall's* papers, (no other like paper being found there,) is the lease or draft of lease which was in the possession of *McFarlane*.

1867.

McFarlane  
v.  
Dickson.

Statement.

Then is it a proper inference that it contained the true agreement of the parties? That the agreement was for an improving lease for some term, is, I think, unquestionable. The idea that it was or might be a tenancy from year to year is to be discarded. It is in evidence that Judge *Hall* contemplated giving leases for terms to all his tenants: the agreements with others was for a term of years, and the draft of lease produced is as good evidence as need be that the same was intended in the case of *McFarlane*. But then, the term might have been for fourteen years, or seven, or

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Dickson.

1867. less; but is there not enough to turn the scale in favour of twenty-one? *John Rodgers* had a conversation with Judge *Hall* in 1855, when the Judge said he was to give a lease, or that he had given one, to *McFarlane*. *Rodgers* does not speak quite positively as to the term, whether it was to be for fourteen or twenty-one years, but he believes it was twenty-one.

Statement.

But the strongest evidence is the draft of the lease. It is evidence that Judge *Hall* was himself willing to give a lease for that term. It is to be assumed, I think, that *McFarlane* assented to that being the term; there could be no reason for his objecting to it, being determinable as it was; and it is to be assumed that Judge *Hall* kept the paper in his possession for a considerable length of time, probably from 1850 until it was called for. Its not being executed may be accounted for by the circumstance, that from the high character of Judge *Hall*, his tenants were content to go into possession and improve without any executed lease or agreement; other tenants besides *McFarlane* did so. The paper being found in the possession of Judge *Hall* does not strike me as militating against its containing the agreement, and the intended terms of lease between the parties. It may have been left in order to be made in duplicate—it is not to be inferred that it was left by way of its being given up or abandoned, or for the purpose of being altered in its terms. I observe two interlineations, in a different pen and different ink from the rest of the paper; when made, whether when it was taken by *McFarlane* to the house of Judge *Hall*, or before, or after, can only be guessed at. I think it not improbable that it was upon that occasion; but whenever done, it proves this, that the instrument was revised, and that when revised, no alteration was made in the term. *McFarlane* was then ill of the malady which ended in his death. Upon the whole, I think the proper conclusion is that the draft does contain the true agreement between Judge *Hall* and *McFarlane*.

I have felt some difficulty from the frame of the bill. 1867.

It proceeds upon an agreement which some of the allegations of the bill speak of as a written agreement; possession and improvements with the sanction of Judge *Hall*, and in pursuance of the agreement, are also alleged. There is no written agreement within the statute, and the possession and improvements are not alleged as in part performance of a parol agreement, or in the usual language of pleading, as in part performance at all. They are nevertheless alleged as a substantial part of the plaintiffs' case, and I am satisfied that the defendants have not been misled. The real contest, as appears as well by the answers as by the evidence, has been whether *McFarlane* was in under a lease or agreement for lease for fourteen years or twenty-one; the defendants' case being that it was for fourteen only. There is no contest as to whether there was an agreement for a lease or not; the only question has been as to the term. I incline to think the objection not fatal; but will give leave to the plaintiffs to amend if they desire it.

*McFarlane.*  
v.  
*Dickson.*

Statement.

I think *Dickson* can stand in no better position than Judge *Hall*. He purchased with knowledge that *McFarlane* was in possession, and that is sufficient, under *Daniels v. Davidson* (a), to affect him with notice of the title, whatever it was, under which *McFarlane* held possession; and as he had notice further that *McFarlane* was in possession under agreement for lease from Judge *Hall*, he must surely be affected with notice of the terms of the agreement whatever it may be.

With regard to the notice to quit given by *Dickson*, it was evidently not given in pursuance of the lease which I find established, for he repudiated any agreement for such a lease; and as to the ejectment, it was not brought in pursuance of any provision in such lease

1867. for default in payment of rent, for the same reason, and as also appears by the record of the proceedings at law ; and moreover it is doubtful upon the evidence whether there was any rent in arrear.

McFarlane  
v.  
Dickson.

As to the defendant *Hazlett*, it is alleged by amendment, that after the filing of the bill the defendant *Dickson* demised to him the premises in question for a term of years, at a yearly rental, and that *Hazlett* had notice of the plaintiff's "claim in the premises" before the execution of the demise. *Hazlett*, by his answer, sets up a lease, dated 11th September, 1863, for five years, at an annual rental of \$300, payable quarterly.\* No evidence is given of this lease, nor on the other hand of notice to *Hazlett* of the plaintiff's claim. *Hazlett* denies notice by his answer.

It was alleged by the plaintiffs at the hearing, that *lis pendens* had been registered. A certificate of registration has since been put in, but its date is 12th November, 1863, two months after the date of the lease set up by *Hazlett*.

Statement.

In the absence of proof of *Hazlett's* lease, there is only the allegation by the plaintiffs of there being some demise by *Dickson* to *Hazelett*. If the allegation had been of a fact known to the plaintiffs, the inference might be that the demise was shortly after the filing of the bill, and so before the lessee could be affected by the registration. There has been no argument upon that point, as it was assumed by the plaintiffs that the registration was prior to the date of the lease set up by *Hazlett*. But I am inclined to the opinion that the lease set up by *Hazlett*, assuming him to have had no notice by *lis pendens* or otherwise, would not bring him

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\* The lease contained a proviso that the lessor might put an end to the same at the end of any year of the term by giving the lessee one month's notice before the end of the year.

within the protection accorded to a purchaser for value without notice. That defence is allowed upon the principle, that the defendant setting it up has an equal claim to the protection of a Court of Equity to defend his possession, as the plaintiff has to the assistance of a Court of Equity to assert his right, and the Court will not in such case interfere on either side. The principle upon which the defence is allowed is so stated by Lord *Redesdale* (Mitford 27), in which he is followed by Lord *St. Leonards*. What is set up by *Hazlett* in regard to his lease does not, I think, give him an equal equity with that of the plaintiff. He simply states the execution of a lease, and possession given to himself in pursuance of it, no moneys paid or expended, nor any rent paid. His answer indeed was sworn only one day after the first quarter's rent became payable, and he alleges no circumstances in relation to the lease to give him any special equity.

1867.

McFarlane  
v.  
Dickson.

Statement.

Whether a lessee can in any case set up this defence, it is not necessary to say. When we consider what must be shewn in support of such a defence, it seems difficult to bring an ordinary lessee within its protection. The defendants must prove payment of purchase money, his being bound to pay it is not sufficient; and that for a reason which is peculiarly applicable to lessees, namely that he is in this Court entitled to relief against its payment. There was a case before Lord *St. Leonards*, of the assignee of a lessee being protected, that of *Molony v. Kernan* (a). The bill impeached a lease given by the plaintiff to his agent, who had assigned it to the defendant for the sum of £210, which sum *Kernan* alleged that he had paid; and claimed that he was a purchaser for value without notice. The cause went off upon another ground, but Lord *St. Leonards* inti-

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(a) 2 D. & W. 31.

McFarlane  
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Dickson.

1867. mated that proof of the payment of the consideration money would have been a good defence. But *Kernan* there was not a lessee; his case was that he was an innocent purchaser for value of that which was the subject of the suit. In *Attorney-General v. Hall*, a premium of £300 was paid for a lease, and Sir *John Romilly* intimated his opinion to be that such a lessee might be protected as a purchaser for value without notice, but it did not become necessary to decide the point. *Ribson v. Flight* (a) before the same learned Judge, and on appeal before the Lord Chancellor (b) was the case of an assignee of a lease, and a decision upon the point did not become necessary. The great difficulty in the way of an ordinary lessee who has paid no premium for his lease, bringing himself within the protection of the rule, is that one main element necessary to the defence, payment of purchase money, is wanting.

Statement.

Whether or not a lessee can in any case avail himself of this defence, I do not see any equal equity with the plaintiffs, in the bare fact of a lease executed and possession delivered without more, as in this case; so that assuming the lease executed before *lis pendens* registered, I incline to think it is no defence. If I had entertained any serious doubt about it, I would have directed the point to be spoken to; and as it is counsel can speak to it if they desire to do so.

The decree as drawn up upon this judgment declared that the late *George B. Hall* did contract with the late *Donald McFarlane* for a lease of the premises in the pleadings mentioned, according to the terms and conditions contained in a certain draft lease therein referred to, and that the said contract should be specifically performed, and a lease made in favour of the said plaintiffs as the personal representatives of the said *Donald McFarlane*, decree accordingly.

And the Court did order that the said defendants should execute to the said plaintiffs such instruments as might be necessary in order to assure to the said plaintiffs their rights and interests as such personal representatives under the said contract, the same to be settled by the accountant of the Court in case the parties should differ about the same.

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Dickson.

And it was referred to the said accountant to ascertain the rents and profits of which the said plaintiffs have been and shall be deprived, and all sums they or either of them shall have lost through their eviction by the said defendant *Samuel Dickson*, until they shall be restored to the possession of the said premises, and to tax to the said plaintiffs their costs of this suit and of the action of ejectment in the pleadings mentioned, and of the sums they shall have paid to the said defendant *Samuel Dickson*, in respect of his costs of the said action, with interest; and it is ordered that the said defendant, *Samuel Dickson*, do pay to the said plaintiffs the said several sums and costs so to be found and taxed by the said accountant, and that the said plaintiffs had a lien on the said premises for the amount thereof until paid.

Statement.

And it was ordered that the said defendants should forthwith deliver to the said plaintiffs, or to whom they might appoint, the possession of the said premises.

And that the said defendants should be restrained by injunction from interfering with the enjoyment by the said plaintiffs, under and in accordance with the said agreement.

And it was ordered that the said plaintiffs should be at liberty to amend their bill of complaint, so as to make and state a case of parol agreement according to the terms of the draft lease in the pleadings mentioned, and of acts of part performance done in pursuance thereof.

1867. The cause was reheard at the instance of the defendants before the three Judges of the Court on the 16th of September, 1865, when the decree was affirmed with costs.

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v.  
Dickson.

The defendants then appealed for the following reasons :

1. Because no written lease or agreement for a lease was proved, and the Statute of Frauds was a bar to the plaintiffs' right to relief.

2. Because it was not established in evidence that there ever was either an actual lease by *George B. Hall* to *Donald McFarlane*, or any agreement for a lease between the said parties of the hereditaments in question in the cause.

Statement. 3. Because it was not proved that there was any lease or agreement for a lease such as the decree establishes.

4. Because if by the evidence any lease or agreement for a lease is proved, the same is for a term of fourteen years only, and the acts of part performance proved have reference thereto.

5. Because the original Bill does not proceed upon a parol lease, or agreement for a lease partly performed, but only makes the case of a written lease, and the amendment permitted by the decree was improperly allowed.

6. Because the original bill does not sufficiently make any case of part performance, and an amendment at the hearing to cure the defect was improperly allowed.

7. Because even though an agreement for a lease and part performance had been proved, as determined by

the Court of Chancery, yet the said *Donald McFarlane* 1867.  
 was not shewn to have been, in his life time, ready, desirous, prompt, and eager in asserting and maintaining his alleged rights under said supposed agreement; but on the contrary, was shewn to have been guilty of gross laches in not asserting his said alleged rights thereunder during his lifetime, upon receiving the letter of notice mentioned and set out in the Bill of Complaint.

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 Dickson.

8. Because even though an agreement for a lease and part performance had been proved, as determined by the Court of Chancery, yet the respondent was not shewn to have been ready, desirous, prompt, and eager in asserting and maintaining his alleged rights, under the said supposed agreement; but on the contrary, was shewn to have been guilty of gross laches in not filing his Bill immediately, on being served with the notice to quit, and in attempting to maintain his alleged right in the said action of ejectment, and in permitting himself to be actually ejected from the said premises before applying to the said Court of Chancery for relief. Statement.

9. Because at any rate the lease set up by the plaintiffs was determinable at the end of fourteen years by notice, and sufficient notice was given to determine the same.

10. Because the draft lease, which the Court of Chancery assumed to have contained the true agreement between *G. B. Hall* and *Donald McFarlane*, contained a clause of forfeiture for non-payment of rent, which under the facts proved, of rent being in arrear at the time of action brought, was sufficient in equity as well as at law to entitle the defendants to bring ejectment.

11. Because the decree is erroneous in giving the plaintiffs the costs of the action of ejectment.

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12. Because there is error in the decree in directing an account against the defendants in respect of all sums which the plaintiffs have lost through eviction under the ejectment until restored to possession.

13. Because the decree is erroneous in giving the plaintiffs a lien on the premises for what should be found due upon the taking of the accounts directed by the decree, and for the costs of the ejectment, and of the suit in Chancery.

14. Because at all events the decree is erroneous and at variance with all precedent in giving a lien upon the premises for the costs of the suit in Chancery.

15. Because the judgment of the Court of Queen's Bench in the action of ejectment is conclusive and binding on the parties.

Statement.

16. Because the appellant *Samuel Dickson*, was a purchaser for valuable consideration without notice, and as such, entitled to the protection of a Court of Equity.

17. Because the appellant *John Hazlett*, is in the position of a purchaser for valuable consideration without notice, and as such, entitled to the protection of a Court of Equity.

18. Because evidence of the terms of other leases made by *G. B. Hall* was improperly received.

19. Because there was not that clear and satisfactory parol evidence of a lease or agreement for a lease which is, according to the rules prevailing in a Court of Equity, essential in all cases where it is sought to take cases out of the Statute of Frauds on the ground of part performance.

The points mentioned in the 12th, 13th and 14th

reasons were not the subject of adjudication by the Vice-Chancellor nor taken on the rehearing. It appeared also that the money had been paid into Court by the defendants before the appeal.

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 {  
 McFarlane.  
 v.  
 Dickson.

The respondents submitted that the decree should be sustained for the following among other reasons :

1. For the reasons stated in the judgment of the Court of Chancery.

2. Because it was proved that there was an agreement for a lease, such as by the decree established, and that there were such acts of part performance as entitled the respondents to the specific performance of that agreement, notwithstanding the Statute of Frauds.

3. Because there was no such action or inaction on the part of either *Donald McFarlane* or the respondents as to disentitle him or them to the specific performance of that agreement ; and they were not bound to go to Chancery before it appeared that they were defenceless at law. Statement.

4. Because no proper or sufficient steps were taken for the determination of the lease.

5. Because the action and judgment in ejectment was not and could not under the circumstances have been, and is not by the pleadings claimed to have been founded on the alleged forfeiture, which in fact had no existence

6. Because the respondents are entitled to be replaced in the position which they would, but for their wrongful eviction by the appellants, have occupied, and are consequently entitled to the account directed, and to a lien on the leasehold interest for the amount found due, including the costs, which they have been obliged to pay

1867. by reason of the action of ejectment brought against them contrary to equity and good conscience.

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7. Because neither the appellant, *Samnel Dickson*, nor the appellant, *John Hazlett*, are purchasers for valuable consideration without notice within the rules of the Court of Chancery, nor have either of them properly set up any such defence.

8. Because the Bill, as framed before the hearing, sufficiently disclosed the plaintiffs' case, and if it did not, the amendment directed was properly directed, and was at any rate an exercise of the discretionary power of the Judge, not appealable nor properly to be interfered with in this Court.

9. Because no evidence was improperly admitted, nor was any objection taken to the admission of any evidence

Statement. 10. Because as to all the grounds of appeal now brought forward as to the details of the decree, the same were not urged in the Court below, either at the original hearing, or upon the settlement of the minutes, or upon the re-hearing, and they ought not now to form the subject of an appeal.

Mr. *Strong*, Q. C., for appeal, cited *Blore v. Sutton* (a), *Cox v. Middleton* (b), *Ormond v. Anderson* (c), *Clinan v. Cooke* (d), *Gordon v. Trewelyan* (e), *Stratford v. Bosworth* (f), *Fry on Specific Performances*, p. 98; *Molony v. Kernan* (g), *Attorney-General v. Hall* (h). *Sugden's V. & P.* 557, 13th Ed.

Mr. *Blake*, Q.C., contra, cited *Lillie v. Ligh* (i).

(a) 3 Mer. 245.

(c) 2 Ball & B. 368.

(e) 1 Price 64.

(g) 2 Dru. & W. 31.

(b) 2 Drew. 209.

(d) 1 Sch. & Lef. 22

(f) 2 V. & B. 341.

(h) 16 Beav. 388.

(i) 3 DeG & J. 204.

The judgment of the Court was delivered by—

1867.

VANKOUGHNET, C.—All parties here admit that the testator was in under a lease from *Hall*. The executors, the plaintiffs, say it was a lease for twenty-one years. The defendants say it was only a lease for fourteen years. There is no evidence that the lease was for fourteen years, but there is evidence that it was one for twenty-one years furnished by a draft or engrossment of a lease in the hand-writing of *Hall*. There is no pretence that the testator was in possession of the premises as a trespasser. He erected a mill and machinery on the premises, and paid rent to *Hall*. In this doubt as to whether the lease was for 14 years—no writing therefor being forthcoming—or for 21 years a writing for which is forthcoming under the hand of the lessor—which should the Court choose? The latter, I should think. Common sense would point to this; and surely neither *Hall* nor his representatives can complain that the plaintiffs adopt his terms of lease written with his own hand. It is rarely that in a disputed case such clear evidence exists against a defendant, and I have no hesitation in saying that any jury and every Court ought, under such circumstances, to adopt these terms in favor of the plaintiffs. On the rehearing of the case before us we thought it so plain that we affirmed the original decree at the close of the argument.

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v.  
Dickson.

Judgment.

A letter of Mr. *Hall*'s, dated the 7th of December, 1855, is referred to as shewing that there never had been any concluded agreement between *Hall* and *McFarlane* as to the lease of the oatmeal premises previously to that date.\* But it would be absurd to

\* The letter here referred to was as follows:

MY DEAR SIR,—I have to go to Toronto to-day, and expect to return this day week. Make me an offer for the flouring bolt. Give what is fair and we may deal, though upon the distinct understanding that you neither grind grists, nor swap flour for them. Will fix the lease on my return.

Yours very truly,

GEO. B. HALL.

7th Dec., 1855.

1867. suppose this, as *McFarlane* was in possession of the premises at the time, and had erected a mill and machinery, and the letter evidently refers not to that which *McFarlane* already had and was in the enjoyment of but to something else in addition for which the parties were in treaty.

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v.  
Dickson.

The evidence of Mrs. *Hall*, the widow, and of *John Hall*, the father of the lessor, strongly corroborate the existence of the lease or agreement for lease contended for by plaintiffs, and if no lease was ever actually executed it most probably was because the parties contemplated an extension of it to additional premises.

We think the appeal should be dismissed with costs.

*Per Curiam.*—*Appeal dismissed with costs.*

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## IN THE COURT OF CHANCERY.

### BESSEY V. BOSTWICK.

#### *Lost will—Proof of contents—Declaration of testator.*

A will was prepared and sent to the testator, and was subsequently seen,—signed by the testator in the hands of his wife—by the father of the residuary legatee and devisee, who read over the will, and, immediately on his return home, made a pencil jotting of the names of the executors as well as of the several bequests other than the provision for the wife; and five days before his death the testator told him that this will was still in existence and that he had given it to a person, whom he refused to name, for the purpose of having a codicil prepared, and a second memorandum was made by him, from the words of the testator, of what he said the will contained, which agreed substantially with the first memorandum. After the death of the testator no trace of the will could be discovered, and a bill having been filed for the purpose of establishing the will, the Court made a decree for that purpose and directing probate thereof to be granted to the executors named therein.

The bill in this case was filed by *John Smith Bessey* Statement. against *John Bostwick*, who claimed to be next of kin of *John Smith*, deceased—*Margaret Applebe*, *John Smith Applebe*, *James Applebe*, and the Attorney General for Upper Canada—setting forth that the said *John Smith* died on the 27th October, 1865, having first made and published his last will and testament, in substance or to the effect following, that is to say—“I, *John Smith*, of the township of Esquesing, in the county of Halton, yeoman, do make this my last will and testament as follows:—I devise to my nephew *John Smith Bessey*, my real estate, being the land on which I now reside. I bequeath to each of the brothers and sisters of my wife the sum of five hundred dollars. I bequeath to my nephew *John Smith Applebe*, the sum of sixteen hun-

1867.      dred dollars. I bequeath the residue of my personal estate, after payment of my just debts and funeral and testamentary expenses, to my nephew *John Smith Bessey*. I appoint my said nephew *John Smith Bessey* and *John Smith Applebe*, of Esquesing, aforesaid, and *James Applebe*, Esq., of Trafalgar, in said county, to to be the executors of this my will ; hereby revoking all former and other wills by me at any time heretofore made. That immediately after the death of testator, (which took place at the residence of plaintiff, where he had lived for a number of years previously,) a thorough search was made by plaintiff and the other executors for the will in such residence, in every part thereof where the same was likely to be, but without effect. That such will was made in 1854, and was not revoked or rescinded by the testator or destroyed by him, or by his authority or sanction, but remained good and valid ; and had been lost or mislaid ; that defendant *Bostwick* claiming to be

Statement.      one of the next of kin of testator, had applied to the Surrogate Court of Halton for letters of administration to the personal estate of said *John Smith*, and that plaintiff and the other executors named applied to the same Court for a discovery and establishment of the said will, and for probate thereof, which applications were subsequently, at the instance of *Bostwick*, removed into this Court by order of 2nd May, 1866, when a bill was ordered to be filed ; that by reason of *John Smith* having been illegitimate, he had no lawful next of kin, and plaintiff submitted that if *Smith* died intestate, or if the said will was not established, the real and personal estate of *Smith* would have escheated to the Crown. The prayer of the bill was for discovery and establishment of the will, and that probate thereof might be taken out by the executors named therein.

The defendants *Bostwick*, *Margaret Applebe*, *James Applebe*, and the Attorney General, severally answered the bill. *Bostwick* disputed the execution of the will as

set forth in the bill—claimed to be entitled, as the eldest son of *Nehemiah Bostwick*, who was the son of the mother of the said *John Smith* by her former husband *Nehemiah Bostwick*, after whose death she married *Thomas Smith*, father of said *John Smith*, to administration of the personal estate of *Smith*. *Margaret Applebe* claimed to have a greater interest in the estate of testator than that given by the alleged will, and denied all knowledge of any such will being in existence. *James Applebe* admitted substantially the allegations of the bill, and the Attorney General submitted the rights of the Crown to the judgment of the Court. As against *John Smith Applebe* the bill was taken *pro confesso*.

1867.

Bessey  
v.  
Bostwick.

The cause having been put at issue by filing replication, evidence was gone into at great length before a special commissioner in the United States, and before the Chancellor at the sittings of the Court at Toronto in the spring of 1867.

Statement.

At the examination in Toronto, the defendant, *James Applebe*, was called as a witness by the plaintiff, and swore that the testator was a relative of his, but takes no interest under the alleged will; that he had drawn two wills for *Smith*; the first one many years ago, which was executed by *Smith*; remembered very distinctly drawing the second will for *Smith*, under his directions, which was several years after the execution of the first will; did not recollect the date, but it was after the death of witness's brother, and sometime about the year 1854, he thought. Did not recollect seeing the will executed; did not recollect whether he took or sent the document to him; but some weeks or months afterwards saw it in the possession of Mrs. *Smith*, in *Smith's* house; that he then and there read it over and examined it; it was just as he had drawn it; did not remember particularly that it was signed; but thought it was finished. That some years, three or four, afterwards, witness had

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v  
Bostwick.

a conversation with *Smith*, in which he spoke of making another will *Smith* introduced the subject by saying that he had a notion of dividing some money among different religious bodies; witness advised him to add to the shares of the legatees; he did not refer to any other will, or to one as in existence or executed; after *Smith's* death, witness and *John Smith Applebe*, in company with plaintiff, who assisted them, searched the house of plaintiff in every part where plaintiff thought it likely a will would be found, but did not discover any. Plaintiff was a nephew of Mrs. *Smith*, who died before the testator, in the house of the plaintiff, with whom *Smith* lived for some years prior to his decease; in all the interviews with *Smith*, witness understood from him that plaintiff was to get the chief part of his property. After plaintiff grew up, *Smith* built another house on the same lot, and moved into it, leaving plaintiff in the old one; *Smith* subsequently moved back to the old house and lived with plaintiff; that plaintiff was still living on this lot (250 acres) as apparent owner; *Smith* seemed always very partial to the plaintiff. Witness remembered plaintiff when a lad of twelve or fifteen years of age; he then lived with *Smith*, who, it was understood in the family, had adopted the plaintiff. The conversation with *Smith*, related by witness, took place six or seven years before his death. Witness further stated, that there was a phrase in the second will prepared by him which he would have wished to correct had the will not been executed; that he had often thought of this; this circumstance impressed it on his mind that the will was executed. In answer to a question as to whether *Smith's* signature was to the will this witness said, "I cannot state the will was signed, but I have no doubt in my mind that it was; there are many things, the existence of which you do not doubt, but which you cannot swear positively to;" the new house on the property in which *Smith* at one time lived was not searched for the will; \* \* \* the will

Statement.

occupied several pages of foolscap paper, perhaps four  
our five pages.

1867.  
Bessey  
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Bostwick.

*John Read Bessey*, father of the plaintiff, was also examined as a witness on his behalf; he swore that he had known the testator for fifty years before his death; from the time of his coming to Canada, in 1816, from the United States, where he was born; that *Smith* then called himself eighteen years of age; he could not have been more than that: the uncle of witness brought him in and left him at the house of witness' father, where he lived as his home until in April, 1821, when *Smith* married a sister of witness, and continued to live there until February, 1822, when he removed to the township of Esquesing, to some land which *Smith* got with his wife: this land forms part of the homestead on which he and plaintiff lived. In 1826, witness moved on to a lot adjoining *Smith's*, in Esquesing; plaintiff was born in Esquesing, and Mrs. *Smith* having no children of her own, wished witness to name the plaintiff after her husband: he accordingly was named "*John Smith*." After plaintiff was weaned, Mrs. *Smith* wished to adopt him, but his mother would not consent. Six or seven years afterwards, she died, and when plaintiff was about nine years old he went to live with Mr. and Mrs. *Smith*: *Smith* wished to have writings drawn on adopting him, but witness objected to any writing binding him or his son: but told *Smith* if he chose to take him and do with him as his own, he might take him, and he took him accordingly; that *Smith* first built a log house, then a frame house, the old homestead, and subsequently put up a brick cottage, into which he and his wife removed, leaving plaintiff in the old homestead. *Smith* and his wife resided with plaintiff from May till September, 1861, when Mrs. *Smith* died, and *Smith* continued to reside with plaintiff till the time of his death, in October, 1865; during this time the brick cottage was rented from time to time. *Smith* was upwards of seventy years

Statement.

  
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 v.  
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1867. old when he died: though infirm of body, his mind was all right when witness saw him on the 22nd of October, 1865, five days before his death; that in May, 1859, in the brick cottage, Mrs. *Smith* shewed him a will; it was signed by *Smith*, and properly witnessed; witness knew *Smith's* writing. In the will ample provision was made for Mrs. *Smith*; it gave her the brick cottage for her life time, and witness thought an annuity payable to her out of the property by plaintiff; there was \$500 left to each of Mrs. *Smith's* four sisters and three brothers; \$1600 to *John S. Applebe*; and the farm, the homestead, was willed to the plaintiff, and the balance of the property, after paying the legacies, to the plaintiff; and that *John Smith Applebe* and *James Applebe* were named in it as executors; that in the spring of 1862, *Smith* told witness that he had in the previous fall deeded the homestead to plaintiff; \* \* \* in January, 1861, witness had a conversation with *Smith* about the will; wit-  
 Statement. ness did not think *Smith* knew he had seen it; *Smith* said he had willed the place, the homestead, to plaintiff; and likewise he said he intended to leave him \$10,000 or \$12,000 besides. Witness understood *Smith* to say, that after payment of the legacies there would be \$10,000 or \$12,000 left plaintiff; this was during his wife's lifetime. \* \* \* When witness visited *Smith*, on 22nd October, 1865 (a Sunday), his son was not at home; that all through his illness, *Smith* could not bear any one to attend to him but the plaintiff; that plaintiff had left home on Saturday, on business, and did not return on Sunday; witness staid with *Smith* all day; on this occasion he was quite sensible, and knew witness at once; \* \* \* witness asked him if his business was all settled, and if he had a will: he said he had; witness asked *Smith* if he had made a new will since his wife's death: he said no. He said the will he had was one that *James Applebe* wrote for him: when asked if it was the one *Applebe* wrote for him when he was living in the brick house, he said it was; he said the executors were *James*

*Applebe*, *John Smith Bessey*, (the plaintiff,) and *John Smith Applebe*, and he named the legacies, which agreed with those in the will witness had seen with *Mrs. Smith*; *Smith* also told witness that he had made up his mind to add something to the will by way of codicil; that he had given it to a man for that purpose, and that he had not returned it. Witness asked who this was, but *Smith* did not seem inclined to tell; he said, this man had had it for two months. Witness then said there was something wrong in the will being kept away so long, and told *Smith* he had better name the man. He said he could not understand why any one would wish to keep his will; he said he was going to add \$300 to all the legacies except those to *Robert and James Bessy*, one of whom was dead, and the other he supposed was dead; he said he was also going to give \$300 to *Dr. O'Meara* for his church.\*

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When witness pressed *Smith* to name the person who had the will, he said if the will was not returned in a day or two he would tell the witness. On the Tuesday morning following, witness went over to see him; he was very low; did not answer questions, and remained so till he died. Witness read the will shown to him by *Mrs. Smith*, particularly the part he was interested in: it appeared to be duly executed and witnessed; the legatees were severally named in the will; did not recollect the names of the witnesses, or that he knew the signatures; knew the signature of *Smith*. Witness made a memorandum of the contents of the will on returning home the same day \* \* \* From what *Smith* told witness, he did not think there was any use searching the house

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\* The witness after his examination re-appeared in Court and said, he wished to correct his statement as to the intended legacy to *Dr. O'Meara*—"I was wrong if I stated it was to be given to him for his church. The deceased *Smith* told me it was to go to him personally, for his services to him, *Smith*, and his wife. Since I signed my former examination, a few minutes ago, *Dr. O'Meara* asked me if I was not

1867. for the will after *Smith's* death ; thought the witnesses to the will were persons who did not reside in his neighbourhood ; did not recollect whether or not witness knew them. Some days afterwards, while the examination was still proceeding, this witness was again called on behalf of the plaintiff, and stated—" Since last examined here, and on Saturday last, I made a renewed search for the memorandum of the will made by me on the occasion, when Mrs. *Smith* shewed it to me in the brick cottage.

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mistaken, and what I meant to say, and now make this correction." It may be observed, however, that the legacy being intended for the church agreed with the statement alleged to have been made by the witness in *Smith's* house in October, 1865, which was in pencil as follows.—

*A Statement of John Smith's Will, drawn by James Applebe.*

Statement.	To James Bessy .....	\$500
	John R. Bessy .....	500
	Robert Bessy .....	500
	Mrs. Applebe .....	500
	Mrs. Jones .....	500
	Mrs. Parks .....	500
	Priscilla Bessy .....	500
	John S. Applebe.....	1,600
		<hr/>
		\$5,100
The balance to J. Smith Bessy.		

*By Codicil or addition :*

To John R. Bessy .....	\$300
Mr. S. Applebe .....	300
Mrs. Jones.....	300
Mrs. Parks .....	300
Priscilla Bessy .....	300
John S. Applebe .....	300
Doctor O'Meara's Church.....	300
	<hr/>
	\$2,100

Executors to this—JAMES APPLEBE, JOHN S. BESSY, JOHN S. APPLEBE.

This Statement taken at Smith's house, October 22, 1865, by  
JOHN R. BESSY.

I found it among my papers, inside a larger paper. I now produce it.\* 1867.

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“It is the identical memorandum made by me at the time mentioned by me. It is in pencil. I did not in this memorandum take down the provision for Mrs. *Smith*, as she seemed satisfied with it, and I had no interest in it. I made this memorandum at my house on the same day on which Mrs. *Smith* shewed the will to me, and after leaving her. I think the provision first mentioned in the will was for Mrs. *Smith*. This memorandum shews all that the will contained, except the provision for Mrs. *Smith*.”

The witness during his examination further swore: “It was not the intention of *Smith* to give the \$300 to Dr. *O'Meara's* church. I made a mistake in putting it down thus. It was as I understood from *Smith*, for Dr. *O'Meara* personally, for his kindness to him and his wife. I made an error in this respect in the entry on the memorandum. He said he had left \$300 to Dr. *O'Meara* for his kindness.” In another part of his

Statement.

\* This memorandum was as follows:—“A Statement of Smith's will, beginning with the legatees—the farm to J. S. Bessey.”

To James Bessey.....	\$500
John R. Bessey.....	500
Robert Bessey .....	500
Mrs. Applebe .....	500
Mrs. Jones .....	500
Mrs. Parks .....	500
Priscilla Bessey.....	500
J. S. Appleby.....	1,600

The balance to John S. Bessey.

The Executors to the will is—

JAMES APPLEBY.  
JOHN S. BESSY.  
JOHN S. APPELBY.

JOHN R. BESSY.

May 10, 1859.

1867. evidence the witness swore that on the occasion of his visiting *Smith* on the 22nd October, he “wrote down the particulars which *Smith* had given me of his will. I asked him two or three questions as to these while I was making the memorandum, and he answered them. I had no idea of making any such memorandum when I went to the house. This memorandum being rough, I got my son to copy it after *Smith*’s death. \* \* \* After, I heard the will could not be found.”

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*Robert F. Bessy*, a brother of the plaintiff’s, was also examined on his behalf, he proved that in a conversation with *Smith*, a little over a year before his death, in reference to his property, when he was at work with a team: “Raising a whip which he held in his hand, he said, ‘Just as sure as I hold this whip in my hand, *Smith* (meaning plaintiff) will get this place [the homestead] and something more with it, unless he does something very bad; and he must do something very bad to deprive him of it.’ He was a man generally of very few words. I asked him no questions—made no remark.” This witness identified exhibit “B.” as a copy made by himself of the pencil memorandum made by his father on the 22nd October, 1865, which was as follows:

“This statement was made to me by *John Smith*, deceased, on the twenty-second day of October, 1865.

This statement I understood to be the contents of his will.

To James Bessey.....	\$500
John R. Bessey.....	500
Robert Bessey.....	500
Mrs. Appleby.....	500
Mrs. Jones .....	500
Mrs. Parks. ....	500
Priscilla Bessey.....	500
John Appleby.....	1,600

The balance to John Smith Bessey.

Intended Codicil to the will :

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To John R. Bessey.....	\$300
Mrs. Appleby .....	300
Mrs. Parks.....	300
Mrs. Jones.....	300
Priscilla Bessey.....	300
John Appleby.....	300
<i>To the English Church in George-</i> <i>town .....</i>	<i>300</i>
<i>The balance to John Smith Bessey.</i>	

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Executors :

JAMES APPLEBY.  
JOHN APPLEBY.  
JOHN SMITH BESSEY.

“It is a correct copy of the original. The heading to this copy was not in the pencil memorandum. The names of the legatees and the legacies are true copies of my father’s pencil memorandum. It is a true copy as regards the figures and the names of the legatees. The heading was put by me at my father’s suggestion.”

Statement.

This statement, together with the facts mentioned in the judgment, sufficiently shew the point in issue.

Mr. *Strong*, Q.C., and Mr. *G. Murray*, for plaintiff.

Mr. *Crooks*, Q. C., for *The Attorney General*.

Mr. *McMichael*, for the defendant *Bostwick*.

Mr. *Moss* for the defendant *John Smith Applebe*.

Mr. *Blake*, Q.C., and Mr. *Blain*, for defendant *Margaret Applebe*.

Mr. *Applebe* for defendant *James Applebe*.

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*Whitely v. King (a), Hingeston v. Tucker (b), Saunders v. Saunders (c), Trevellyan v. Trevellyan (d), In re Ripley (e), Brown v. Brown (f), In re Browne (g) Wharram v. Wharram (h), Patten v. Paulton (i), Welch v. Phillips (j), Colvin v. Fraser (k), Doe Shallcross v. Palmer (l), Quick v. Quick (m), In re Glegg (n), Eckersley v. Platt (o), Podmore v. Walker (p), Tippet v. Tippet (q).*

VANKOUGHNET, C.—The question which I have to decide at present is “will or no will,” or the *factum* of a will at testator’s death, which the plaintiff here propounds. No will has been found since the death of the deceased. To establish one, or the one propounded, I must be satisfied of three things.

1st. That the deceased did make a last will and testament.

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2nd. Its contents, and

3rd. That though it cannot be found, the presumption arising therefrom of its destruction by him, *animo revocandi*, is rebutted.

1st. That the testator did make a will in 1854, undisturbed by any later testamentary paper, I find, as a matter of fact. The principal witness to the existence and therefore the execution of such a will is *John Read*

(a) 10 Jur. N. S. 1079.

(c) 6 Ecc. Rep. 318.

(e) 1 Swa. & T. 68.

(g) 1 Swa. & T. 327.

(i) 4 Jur. N. S. 341.

S. C. 1 Swa. & T. 55.

(k) 2 Hagg, 206.

(m) 3 Swa. & T. 442.

(o) 1 L. R. Pro. 281.

(q) 35 L. J. Pro. 41.

(b) 2 Swa. & T. 596.

(d) 1 Phill. 149.

(f) 8 E & B. 876.

(h) 33 L. J. M & D 75.

(j) 1 Moo. P. C. 299.

(l) 16 Q. B. 747.

(n) 35 L. J. Prob. 113.

(p) 3 Swa & T. 449.

*Bessey*, who is or was named in it as a legatee. To render him legally competent in this suit to depose as to it, he has released all interest under it. Had his evidence as to the existence of this lost or absent will stood alone and without corroboration, I would have refused to act upon it, for I quite agree with the oft repeated language of Sir *James Wilde*, the present able Judge of the Court of Probate and Divorce, that the execution, the existence at any time, and the contents of an absent will must be proved by evidence which leaves the mind of the Judge free from all reasonable doubt." Else wills might be made for men, for the first time, after their death; and this doubt could never be removed where such a will is sought to be established on the testimony of witnesses who, whatever their legal competency, in a technical sense, may be, are yet biassed in establishing it, in the reasonable hope or expectation, so likely to be entertained, that their formal release of any interest or claim under the will will never be insisted on or set up against them by those in whose favour their evidence has procured judicial recognition of it, or, because of benefit to their immediate relatives under it. Both these grounds concur here to affect the unaided testimony of *John Read Bessey*, and I think that for reasons of public safety applicable to all similar cases, the Court should refuse to act upon it, however entire the credence it may be disposed to give to the testimony of such a witness in a particular case. I think the rule should be inexorable in the interests of those whose rights by such testimony might be destroyed, rights with which the alleged testator might never have intended to interfere. Although every man cannot stand the ordeal of a cross examination, many men of nerve can, and others of less power could readily prepare themselves to do so, if they knew that by positive swearing and by a circumstantial history of details which they had determined not to depart from, nor allow to be shaken, they could benefit those whose fortunes and advancement they had a natural and therefore

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1867. a strong desire to promote. In this very case nothing, not even the trivial circumstance which I will advert to hereafter, occurred to lead me to doubt the truthfulness and accuracy of the evidence of *John Read Bessey*; yet, himself a legatee (though now disclaiming) under a will which largely benefitted all his relations, and more than all his son, I would not act upon that evidence to establish even the existence at any time of the will. But this evidence, clear and consistent as it was, is so strongly corroborated by independent testimony and facts both as to the existence and the contents of the will of 1854, that I do not hesitate 1st, to find that a will was in that year made by the testator; and 2ndly, that its substance, in all that is material here now, is that set forth in the plaint. I agree that the declarations of the alleged testator are not evidence to establish either the execution or the contents of a will, but on a question of the credibility to be attached to the statement of a particular witness, as here, I think those declarations, proved *aliunde*, are admissible. In support of the testimony of *Bessey*, who deposes to having seen and read the will and the signature of the testator to it, is the evidence of *James Applebe*, who drew such a will for the deceased to sign; and drew it by his instructions in substitution for a former will which he thinks was then destroyed; and who states that he saw it subsequently in the house of the deceased and during his life time, when he is morally certain it was signed and executed by him, though at this distance of time he will not swear to it from memory; while he mentions as a reason for believing it had been then signed, that he asked to look at it with a view to altering a particular word or phrase; and that he refrained from doing this because the paper had been executed—at least he says that must have been the reason. Then come the repeated declarations of the deceased himself, as to his having made a will, by which, in addition to his real estate (not in question here) the plaintiff would be largely benefitted by the residue of

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his estate. On two occasions, at all events, on which he stated he had made a will, he was speaking on the subject of his affairs, not in the way of mere gossip, but to two lawyers whom he was consulting concerning them. One of these was Mr. *McNab*, who was employed by him to make a deed of his real estate to the plaintiff; although if the will was of the character stated, and in existence, it covered it, and this, as *McNab* says, the deceased knew, but he preferred to give the deed. The other was Mr. *Livingstone*, to whom a couple of months before his death he spoke about making alterations in his will, expressing his intention to employ him, *Livingstone*, to put them into shape. Besides this, is the testimony of a son of one of the legatees, *Robert Applebe*, who deposes to having carried the will from *James Applebe* to the deceased, and of having read its contents (which he did not describe very accurately), and the signature of the deceased to it. This latter testimony alone, I would not have considered as sufficient to corroborate the testimony of *John Read Bessey*; the deponent was only a lad of fourteen years of age at the time of which he speaks; he evidently does not state correctly the contents of the will, and it could not be expected that he should, and he may merely have seen places for signatures with seals attached (which it seems Mr. *James Applebe* always employed as if necessary) instead of the signatures themselves; and moreover, he is the son of a widow largely interested by an arrangement with the plaintiff in establishing this will. The variance, however, between this witness's statement and those of others, as to the contents of the will, go to prove that he stated the truth so far as he knew it, rather than that he was detailing a story which had been concocted and which thus could have been readily made to coincide with the evidence of the others. According to all the testimony,—that of *James Applebe*, who prepared the will, that of *John Read Bessey*, who read it in the house of the deceased, and took a memorandum of the only part of it which this

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1867. Court under the change of circumstances can administer, and the declarations of the deceased himself made to several persons, the residuary legatee of his personal estate was the plaintiff. According also to the testimony of *James Applebe*, so far as he would speak from memory, of *James Read Bessey*, and to the declarations of the deceased, *John Smith Applebe*, a nephew of his wife, was a legatee of \$1,600, and the brothers and sisters of his wife were legatees of \$500 each. These are the parts of the will which it is sought to establish here, and the only parts now of any importance, with the exception of a bequest to Dr. *O'Meara*, of which I will speak hereafter; because while the same evidence shews that by the will provision was made for the wife of the deceased, and his realty was devised to the plaintiff, yet these provisions are ineffectual, by reason of his wife having died before him, and his realty having in his life time been conveyed by him to the plaintiff. The nature and terms

Judgment. of these particular devises might be of importance in testing the memory of the witnesses as to the contents of the will; but I think, that, for such a purpose, the statement of them by the witnesses was sufficiently accurate, and the memory of them would most likely be weakened on the death of Mrs. *Smith* and the conveyance to the plaintiff, when they became of no importance. Moreover, as *Bessey* says he paid no particular attention to the provision for Mrs. *Smith*, as she seemed satisfied with it, and this is corroborated by the evidence of *James Applebe*, who saw the will in her custody; and as she made no complaint about it, we may treat *Bessey's* statement in this respect as corroborated. Strengthened and supported then as *John Read Bessey's* statement has been, I see no reason to doubt the accuracy of the extracts from the will contained in the memorandum made by him on the same day, and shortly after he had read the will as produced to him by Mrs. *Smith*. This memorandum does not allude to the provision for Mrs. *Smith*, because, as *Bessey* says, she seemed satis-

fied with it, and he had no interest in it. Besides the residuary bequest to the plaintiff, and the legacy to *O'Meara*, it states the legacies to himself and the other brothers and sisters of Mrs. *Smith* and to *John Smith Applebe*, his nephew; and these, with the exception of the latter which was for \$1600, were all of equal amounts, viz: \$500. It required no great effort to carry these bequests, and the bequest of the residue to his son, in his memory for the two or three hours which elapsed from the time of his reading the will to the making of the memorandum. He knew who his brothers and sisters and nephews were, and he knew that to each, with the exception of the one, was left \$500, and that to that one was left \$1600—legacies not difficult to remember by one of Mr. *Bessey's* intelligence. In addition to this was the repetition to him by the deceased, four or five days before his death, and in his last illness, of these same bequests as constituting his will—a memorandum of which *Bessey* produces as made by him at the time, in the presence of the testator, and after inquiry of him as to their correctness. This memorandum of course is not evidence to prove the contents of the will, but I admit it on this head merely as corroborating *Bessey's* former memorandum. Both these memoranda look to be genuine, they are made in pencil, and present the faded tracing which pencil writing long kept usually exhibits. There is one and only one inaccuracy, I think—that already referred to—detected in the evidence of Mr. *Bessey*, and that is, as to certain figures upon the last made of these two memoranda. These figures evidently represent the amounts of the legacies in the testator's will as it stood at the time, and certain additions which he then stated to *Bessey* he intended to make to them. The witness said that he had made these figures on the paper previous to the memorandum of the contents of the will, and that they related to some quantities of apples they had been gathering in. In this the witness was evidently mistaken; but,

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1867. had he thought it of any importance, and had he been swearing to what was false, it would have answered his purpose better, and have been as easy for him to say that they represented the legacies given and to be given rather than the apples. I therefore attach no importance to this unwitting mistake. I had forgotten till this moment that there is a contradiction in *Bessey's* statement of the contents of the will, as regards the legacy to Dr. *O'Meara*. *Bessey* first stated that this legacy was left to Dr. *O'Meara* for his church, and the pencil memorandum first taken by him shews that this was so. Shortly after leaving the witness box *Bessey* re-turned, and said that in the meantime he had conversed with Dr. *O'Meara*, and he now remembered that the testator had told him that the bequest was to Dr. *O'Meara*, for his personal kindness. The testator very probably told him this; but I think that his first statement and the memorandum shew that the bequest was to Dr. *O'Meara* for his church, and I therefore find this bequest to be as stated in that memorandum. The reference to this last memorandum brings me to the consideration of the third inquiry in the case, and upon this it is that I have had any doubt.

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Doubts, however, upon this branch of the case are less perplexing, and may be dismissed with less hazard and less injury to the intentions of the testator and the rights of parties affected by them, than where they exist as to the proof of execution of a will or its contents. It is of terrible consequence to establish the existence or contents of an absent will upon doubtful testimony. It is far less appalling to one's sense of justice and right to believe that a will, proved to have once existed and to have contained a full disposition by the deceased of his property, continued to represent his intentions and wishes at his death, where its actual destruction has not been proved; though it be absent, from having been destroyed by accident, or from being mislaid, or withheld

by some one entrusted with it. In such a case one has to balance the probabilities upon the evidence of opposing facts and presumptions, when the evidence does not lead with certainty to the one conclusion or the other. In this case, the will which I have already found the testator once made, and which I have also found was never replaced by any other testamentary paper, undoubtedly expressed at the time and for years afterwards, his wishes as to the distribution of his estate on his death. It is consistent with his oft-repeated declarations in regard to it, made from time to time afterwards, and up to almost the moment of his death; up to a time, at all events, after which he could have had but little strength of body or mind to make another or a different will—nay, it is consistent with his declarations that he intended, from the intermediate increase in the value of his property, to add to the specific legacies; an addition which he, however, never made. I think it clear upon the whole evidence, that the deceased never intended to die intestate. The will was, under the circumstances of his life and position, a most natural one for him to make. Coming to this country more than fifty years ago, a boy and a stranger, without any acknowledged friends or relations, he was received into the family of one of the *Bessey's*, in early life, he married a daughter of that family; and, in her right, as the daughter of a U. E. Loyalist, drew a lot of land to which he subsequently added, by purchase, making the property his farm and homestead. Having no children of his own, and his wife taking a fancy to the plaintiff her nephew, the deceased, when the boy was nine years of age, adopted him, promising his father to provide for him. This boy grew up treated as his son; and as he attained mature years, was consulted and trusted by the deceased in all his matters of business down to the last moment in which he, the deceased, attended to them. The deceased believed himself illegitimate. He had never, during his long life in this country,

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acknowledged any relation—never spoke of any—never expressed any intention to benefit any one of kin to himself, if such an one ever existed—never was visited by any one who has ever pretended to be of kin to him except one of the defendants, *Bostwick*, whom he then repudiated, and who, it is shewn by the evidence, claimed no kindred with the deceased at the time; though since his death he has made such claim, and by reason of this pretension has been permitted to be a party here to contest this will, as he has actively done. The evidence of Mr. *McNab*, whom the deceased consulted professionally a couple of years before his death, on the subject of conveying his real estate to the plaintiff, shews that he was not only aware of his illegitimacy, but was also then made aware that, by reason of it, it was desirable he should adopt proper means for the disposal of his property on his death. To Mr. *McNab*, on this occasion, he mentioned that he had a will. On the Sunday before his death, he stated to *John Read Bessey* how, under his will, he had disposed of his property, and this disposition was the same as that which *Bessey* had read six years previously in the will shewn to him by Mrs. *Smith*. The memorandum then taken by him and the memorandum taken by him on the Sunday, in this respect, accord. *Smith*, on the latter occasion, said that he was going to add to the legacies, and mentioned the additions he intended to make, and said that his will was in the hands of a third person, who was to prepare a codicil to it for this purpose. He would not then name that person, but said he would tell his name if the will was not returned to him in a couple of days. At the lapse of a couple of days from this time, he was insensible, and death was close at hand. This conversation was the last we hear of the will. It has never appeared since—nor indeed has it been seen since 1859, when *James Applebe* and *John Read Bessey*, on the two occasions referred to, saw it in the brick cottage on the farm, in which the deceased was at the time resid-

ing. Shortly after this, the deceased and his wife left the brick cottage, and moved about among his relations, living for a time with one and the other, until some four years before his death, when he and his wife took up their final abode with the plaintiff on the farm. Both of them died there, attended by the plaintiff and his family. In moving about from place to place this will may have been lost, and when the deceased spoke on Sunday of having given the will to a third person, for the purpose of preparing a codicil to it, he may, with mind and body weakened by age and illness, have imagined he had, as from his conversation with *Livingstone* he had evidently intended to do, given it to the latter for the purpose of making the changes or additions contemplated. This is as likely a conjecture as that in a whim or moment of caprice he utterly destroyed it. It is probable that he never for years saw his will and never looked for it. Men are not in the habit of looking at their wills after once they have summoned up courage to make them. It is not a document which men generally like to gaze at, and if it is open to probability that the testator supposed he had handed his will to *Livingstone* or some one else as he had intended, without ever having done so, then it is still more probable that he had not seen it for years, and that it may have been lost or accidentally destroyed without his knowledge.

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Opposed to this hypothesis is the presumption of destruction arising from the absence of the will, strengthened by the evidence of *Livingstone* that, on the occasion when he visited the deceased, two months or so before his death, he expressed his dissatisfaction with plaintiff's family, and his suspicions that they were not dealing fairly with him, and his intention to alter his will, saying that the plaintiff had had enough and would get no more; and his request to *Livingstone* to call some morning, and he would give him instructions for that

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purpose. But even then he spoke of his will as in existence, and merely of his intention to alter it. This is really the only evidence of any dissatisfaction with the conduct of the plaintiff expressed by the deceased. He was then an old man, and any want of attention at the moment, on the part of the family, would excite an irritable temper, and provoke such remarks, though it may also be said that the same or a similar caprice might lead him to destroy the will. But he never spoke of destroying it, to any one or at any time. On the contrary, he only spoke of adding to it in favor of the specific legatees named in it, by which means of course the residue coming to the plaintiff would have been reduced; and this, from the growth of his means, he probably intended, though it would be a violent conjecture that to effect this reduction in the plaintiff's share, he destroyed the will in toto, thus extinguishing those very gifts which he not only intended to confirm, but to increase. It is true, circumstances had altered since he made the will. His wife had died, and his only real estate, a valuable farm, had been conveyed to the plaintiff, who in return was to support and provide for him during the rest of his life. But there is not a particle of evidence to shew that because of these changes the deceased intended to die intestate as to the large personal property he had accumulated. As the plaintiff would be the gainer by the increase of his property and the falling in of Mrs. *Smith's* lapsed legacy, it is very probable he intended to reduce his share, and add to those of the other legatees. The most that can be said is, that he did not effect this purpose. Am I then to conclude that he destroyed this will, carefully prepared in substitution for a prior will: to the importance of which, as a means of disposing of his property, he was fully alive; which had existed for years in his possession; and which continued to exist, in his belief, down almost to the moment of his death; for, on this head, the declara-

Judgment.

tions of the deceased are evidence; and, to discard those declarations made to *Bessey* on the same day as they had previously been made to others, I must either conjecture that the deceased, notwithstanding his then weak state, told a falsehood to mislead and quiet the *Bessey* family, or else hold that *Bessey* himself has been guilty of wilful and deliberate perjury. An instrument which takes effect on its execution may be established at any time by parol evidence of its contents, when it cannot be found. A will is of a different nature, being revocable at any time during the life of the testator, and, if not forthcoming at his death, the law raises a presumption of fact that it has been cancelled by the deceased. But that presumption may be rebutted by circumstances; and I think the circumstances here so strong to shew that the testator could not have destroyed this will unless by accident and unintentionally; that I have come to the conclusion to uphold it as his last will and testament at the time of his death, and to order that probate of it be granted to the executors whose names have been proved by the same evidence that establishes the contents of this will.

1867.

  
*Bessey*  
 v.  
*Bostwick.*

Judgment.

In conclusion I am, I think, fortified by the cases of *Saunders v. Saunders*, 6 Notes of cases; *Countess Clorenzo's* case, 1 Swa. & Tr.; and *Whitely v. King*, 16 C. B. N. S.

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1867.

## YALE V. TOLLERTON.

*Locatee of Crown—Execution against lands.*

This Court will, at the instance of a judgment creditor of a locatee of the Crown, with execution against lands in the hands of the Sheriff, direct the interest of the locatee to be sold and order him to join in the necessary conveyance to enable the purchaser under the decree to apply to the Crown Lands Department for a patent of the land as vendee or assignee of the locatee.

This was a bill by a judgment creditor of the defendant with *fi. fa.* lands in the hands of the Sheriff, alleging that the defendant had not any real estate seizable at law, the only property held by him being a right as purchaser of certain lands from the Crown for which no patent had yet issued, and on which a portion of the original purchase money was still due; and prayed foreclosure or sale. The bill was taken *pro confesso* against the defendants, and

Judgment.

*Mr Barrett*, for the plaintiff, asked that a decree of foreclosure might be drawn up, or such other decree as the Court might feel at liberty to make.

VANKOUGHNET, C.—I do not see my way to making any other decree than one directing the sale of the defendant's interest in the land, and that he shall execute to the purchaser of it, such an assignment as will enable him to obtain from the Government the patent as the assignee of the defendant; the Master to settle the assignment in case the parties differ. Costs to plaintiff.

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## McARTHUR v. WEBB.

1867.

*Husband and wife—Deed of trust for supporting wife—Separation.*

Although the policy of the law is to induce a man and wife to resume co-habitation notwithstanding they may have agreed to a separation, and that on such renewal of co-habitation a deed of separation will be held void; still where property was conveyed to a trustee for the support and maintenance of a wife and her children in settlement of a suit for alimony, and the husband and wife afterwards renewed co-habitation, but the husband subsequently deserted his wife and family, the Court refused, at the instance of the husband, to set aside the deed.

This cause came on for the examination of witnesses and hearing, at the sittings of the Court at Toronto, in the spring of 1867. From the pleadings and evidence it appeared that a suit for alimony had some years before been instituted against the plaintiff, in which an order for interim alimony had been granted, but before the cause was brought to a hearing an agreement was entered into between the plaintiff and defendant, where-  
by in consideration of the wife barring her dower in certain real estate of the husband, and discontinuing proceedings against him, the plaintiff conveyed the lands in question in this suit to the defendants *Webb* and *Stokes*, as trustees for the support and maintenance of the wife and her children during her life, and after her death for the benefit of the children then surviving; the trustees covenanting with the husband to save him harmless and indemnified against all debts incurred by the wife. Statement.

The parties continued to live separately, the wife managing the land and supporting herself and children without calling upon the husband for any aid for that purpose.

After continuing so to live apart for some years, the husband returned to the residence of the wife when

1867. *McArthur v. Webb*, they co-habited and continued for about six months to live together; during this time, however, the wife managed the property as her own, paid her own accounts, and supported herself and children, irrespective of her husband who again deserted her and her children, and has since continued to live separate and apart from her.

The present suit was instituted by the husband against the wife and her trustees for the purpose of having the deed of trust declared void in consequence of the reconciliation which had so temporarily taken place between them.

Mr. *Blake*, Q. C., and Mr. *Crombie*, for the plaintiff.

Argument. Mr. *Strong*, Q. C., and Mr. *A. Hoskin*, for Mrs. *McArthur*.

Mr. *J. Hoskin*, for the trustees. *St. John v. St. John*, (a), *Fletcher v. Fletcher* (b), *Hindley v. Westmeath* (c), *Schoales v. Gowan* (d), *Byrne v. Carew* (e), *Wilson v. Mushett* (f), *Jodrell v. Jodrell* (g), *Webster v. Webster* (h), *Seagrave v. Seagrave* (i) *Hulme v. Chitty* (j), *Frampton v. Frampton* (k).

VANKOUGHNET, C.—The plaintiff and his wife having separated in consequence, by her allegation, of his ill-treatment, and a suit having been instituted by her for alimony, and being pending with an order for interim ali-

(a) 11 Ves. 526.

(c) 6 B. & C. 200.

(e) 13 Ir. Eq. 1.

(g) 9 Beav. 45. S.C. 14 Beav. 397.

(i) 13 Ves. 439.

(j) 9 Beav. 437.

(b) 2 Cox 99.

(d) 1 C. & P. 39.

(f) 3 B. & Ad. 143.

(h) 1 Sm. & G. 489.

S. C. 4 D. M. & G. 437.

(k) 4 Beav. 287.

1867.

McArthur  
v.  
Webb.

mony, the plaintiff agreed to settle the suit and provide for her future maintenance and that of her children, and accordingly a deed for that purpose was executed by him whereby after reciting that both parties desired and had agreed to settle the said suit, and had further mutually agreed to live separate and apart during the remainder of their joint lives, and that upon the treaty for such separation and such settlement of the said suit it was agreed that the plaintiff should convey absolutely in fee a certain parcel of land unto and for the use of his said wife *Catharine* for the use of the said *Catharine*, and upon the trusts in the said deed set forth, and should also assign and transfer absolutely to the said *Catharine* for her own sole use and benefit and disposal, all the household furniture, goods, &c., in the dwelling house and buildings on the said land, and also the live stock and chattels enumerated in a schedule to the deed attached, and that in consideration thereof the said *Catharine* should at any time when required by the plaintiff re-  
lease her dower in the south east quarter of lot 29, in the 4th concession of King, and that she, the said *Catharine*, should thenceforth, support, maintain, and clothe, free from expense to the plaintiff, the children of him and the said *Catharine*, seven in number, until they respectfully attained twenty-one years of age; and that the right of *Catharine* to dower (except in the piece of land last above mentioned) should be unaffected by said agreement and deed, he, the plaintiff, in pursuance of said agreement, and in consideration of settlement of said suit, and in consideration of the covenants and agreements thereafter contained, and of 5s., conveyed to the trustees the land and premises first above mentioned upon trust to and for the sole use of *Catharine* during the remainder of her natural life, as if she were sole and unmarried, and upon her death to convey the same to the said children as tenants in common. The deed also gave her the chattel property referred to,

Judgment.

1867. to deal with as she pleased, and any sum of money or  
personal property which she might afterwards receive  
or acquire. It contained a covenant by the trustees to  
indemnify plaintiff against debts of *Catharine while she  
lived separate and apart from her husband*. The deed  
also gave power to *Catharine* to lease the premises for  
any term not exceeding her natural life.

McArthur  
v.  
Webb.

Judgment.

I read this deed to be a separation deed, in the ordinary sense. It sprung out of the actual separation which had taken place, and it provided for a continued separation. Separation was the cause of—the motive for—and the object of the deed. But for this unfortunate necessity, there is no reason to judge from the terms or provisions of the deed that any such arrangement as it makes, consequent on separation, would have been entered into. The settlement of the alimony suit was a necessary preliminary to or concomitant of this agreement; and therefore in no way takes from the character of the deed as a deed of separation, or strengthens it as binding and valid independently of the provision for separation; and it seems to me, therefore, that when such reconciliation took place between the parties, and they lived together as man and wife, as they are shewn to have done from January to June, 1865, that the deed, shorn of its object and purpose, was avoided and fell, unless indeed it could be upheld on the agreement by which the wife was to release, as she has actually released, her dower in the parcel of land mentioned above. With regard to that, it seems to me, that the Court would not uphold the deed on this minor consideration only. It was part of the arrangement for separation, grew out of it, and was a mere term, consequent thereon, and in regard to which the Court could secure the wife ample compensation, were it disposed otherwise to set aside the deed or relieve the plaintiff from it. It might be said that the personalty given to her was in satisfaction

of this release of dower; but, the consideration as stated in the deed is a mixed one, and I have no right to separate a part of it from the rest, and say that it was given and taken in payment of the dower. But, admitting all this, am I called upon to assist the plaintiff here? It seems that he returned to his wife in January, 1865, and deserted her in June of the same year, and has since lived apart from her; that all this time she has maintained and supported the children; that while the plaintiff lived with her, during these five months, he treated the property as hers; did not interfere in the management of it; declared it was hers, and actually accompanied her to a conveyancer when she made a lease of it, the plaintiff himself making a lease of the adjoining portion in his own name. It seems that both parcels were held under one lease, and that the property having been severed on the execution of this deed of separation by the conveyance of a portion of it to the wife, it was thought advisable by the plaintiff, and his wife, and the lessee, that the old lease should be given up, and two leases executed for the two parts, one by the husband, and the other by the wife; and this was accordingly done as mentioned already. So also, while they lived together, he and his wife kept separate accounts of their respective dealings with tradesmen, and paid separately their respective accounts. The plaintiff, without any apparent reason, without having required that she should abandon any claim under the deed; on the contrary, treating her as in full enjoyment of her rights under it, leaves his wife, and leaves her children with her to be supported by her; and, under these circumstances, and fifteen months afterwards, files this bill to have the trusts of the deed in her favor in respect of the realty declared void, I do not think I am bound to make any such declaration, or interfere; but that I should leave the plaintiff to any course which may be open to him at law. If the deed, as to the wife, be invalid, it is equally so there as here.

1867.

McArthur  
v.  
Webb.

Judgment

1867.

McArthur  
v.  
Webb.

Judgment.

The policy of the law is no doubt against any provision for future separation, and any deed that provides for it is invalid; and the law welcomes the reconciliation of the parties, and where this takes place, treats the previous arrangement for separation as at an end—blots it out in fact. But while the law thus, does everything to induce parties to live together, and discountenances all inducements to their living apart, it equally protects the wife against the cruelty or desertion of her husband, and, though it cannot make them live together, it will secure a provision for her maintenance out of her husband's property. There is no policy or rule of law which says that the husband shall be relieved from this, while he is to blame. Now, in the present case, the wife could to-morrow file her bill for alimony; and, while this is so, the husband applies to me to deprive her of that provision for the maintenance of herself and her children which he himself considered sufficient and proper when they were living apart before, as they are now. I do not think that by declining to interfere now, I am holding out any inducement to the wife to continue the state of separation between her and her husband. She does not appear to have promoted it in any way; the husband is the deserter and the wrong doer and while he remains so, I will not assist him. I refuse his prayer with costs.

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1867.

## IN RE CHARLES MCINTOSH.

*Construction of Will—Survivorship.*

A testator devised certain land to his two sons, their heirs or assigns, or the survivor of them, when they attained the age of 25 years, to have and to hold the same, share and share alike forever, and directed that if the two sons should die without issue, before they inherited the property devised, their share to go to the survivors of the testator's children living at that time: one of the sons died under the age of 25, without issue.

*Held*, that the surviving son, who attained the age of 25, took the whole property.

By his will the late *Mr. John McIntosh*, of Toronto, devised as follows:—

4. I give and devise unto my two sons *James McIntosh* and *Charles McIntosh*, their heirs and assigns, or the survivor of them when they attain the age of twenty-five years, all and singular that certain parcel or tract of land on the corner of Yonge Street and Queen Street, purchased from the *Hon. George Cruikshank* and *James B. Macaulay*, executors of the late *Doctor Macaulay*, containing about a quarter of an acre, together with all houses and buildings thereon, to have and to hold the same, share and share alike forever, subject, nevertheless, to conditions hereinafter mentioned. Statement.

9. It is my will and pleasure that if my two sons, *James* and *Charles McIntosh*, should die without lawful issue, before they inherit the property that I have devised to them, their share to go to the survivors of my children living at that time.

*James McIntosh* died under 25 years of age without issue, and *Charles McIntosh* attained that age. The latter then applied to the Court, for a certificate under the act for quieting titles. (a) The Referee reported that

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(a) 29th Victoria, Cap. XXV.

1867. the petitioner was entitled to the whole property as against one of his sisters, who claimed an interest under the above provisions of the testator's will. From this finding the claimant appealed.

*In re Charles  
McIntosh.*

*Mr. McMichael*, for the appellant, contended that the property devised vested in the two brothers, and that, on the decease of the *James McIntosh*, his share went to his surviving brothers and sisters equally.

*Mr. McGregor*, contra, argued that it was a matter of no consequence whether any estate vested in *James McIntosh* or not, for if it did, it was divested upon his death, and *Charles McIntosh* took the whole, as the survivor.

VANKOUGHNET, C.—The testator made his will containing the following clauses. [The Chancellor here read the two clauses above set forth.]

Judgment.

*James*, the elder of the two brothers, died without issue before attaining the age of 25 years. I think the plain provision and meaning of these two clauses of the will is, that in the event which has happened, the whole estate should go to *Charles* the surviving brother, who has attained the age of 25 years. This seems to me the obvious clear intention of the testator, and I know of no rule of construction which compels me to disregard it. Whether the estate vested in the two sons on the testator's death, or whether it was not to vest till both or the survivor of them attained 25 years of age, can make no difference in the event which has happened. If the estate vested it was liable to be divested, and was divested on that contingency, and must go over to the survivor. I think the 9th clause of the will, read with the 4th clause, shews that the testator's meaning was that the survivor of the two brothers, when one had failed to reach the age of 25 years without issue, and the other

had. as here, attained that age, should take or hold the property. *Mr. McMichael's* argument was very ingenious, that the word "survivor," meant survivor at the testator's death, and that this being so, there were no sufficient words in the will to divest the estate, if it had once vested in Charles. But I don't think the testator employed the word in this sense. I think he meant the survivor of the two who had attained 25 years of age, and I must therefore dismiss the appeal with costs.

1867.  
In re Charles  
McIntosh.

### TRYON V. PEER.

*Parties—Pleading—Demurrer—Descent.*

Where a party claims as one of the heirs of the half blood of an intestate, and in his bill professes to set out how his interest arises, it is necessary for him to negative the fact of the intestate having obtained the land by gift or devise from an ancestor; or if he did so obtain it, the claimant must shew that he is of the blood of such ancestor.

Where in a bill for partition it was stated that certain infants residing with or near their father, out of the jurisdiction of the Court, not parties, were interested in the lands sought to be partitioned, their father being a party defendant, a demurrer for want of parties was allowed.

The bill in this cause was filed by *Elijah Tryon*, Statement. against *Rosanna Peer* and *Stephen Peer* her husband, *Louis Tryon*, *Sodena Brooker* and *William Brooker*, her husband, and *James Knapp*, setting forth that *Elias Fairchild Tryon*, formerly of the township of Mersea, in the county of Essex, yeoman, died intestate, on or about the twenty-sixth day of December, 1865, leaving him surviving, his widow, *Jane Tryon*, and no issue, and no father or mother.

That the heirs and heiresses at law and the nearest

1867. collateral relatives of the said *Elias Fairchild Tryon* were the plaintiff and the defendants *Sodena Brooker* and *Louis Tryon*, the sons and daughters of *Asahel Tryon* deceased, formerly brother of the half blood of the said *Elias Fairchild Tryon* and the defendant, *Rossanna Peer*, daughter of *Ephraim Tryon*, deceased, formerly brother of the said *Elias Fairchild Tryon*, also the children of *Jane Knapp*, deceased, wife of the defendant *James Knapp*, another daughter of the said *Ephraim Tryon*, which said children consisted of two sons and three daughters, all infants under the age of twenty-one years, and resident with or near their father, the said *James Knapp*, in the State of Iowa, in the United States of America, which is the most precise information of their place of residence the plaintiff had been able to obtain, although he had used due diligence and made inquiries to ascertain the same.

Tryon  
v.  
Peer.

Statement. That the said *Elias Fairchild Tryon* was at the time of his death seized of an estate of fee simple in possession of and in the lands known as lot number three in the seventh concession of the Township of Mersea, in the County of Essex, containing two hundred acres, more or less.

That the plaintiff, and the said *Sodena Brooker* and *Louis Tryon* have purchased from the said *Jane Tryon*, since the death of intestate, her dower in the premises, and prayed, amongst other things, partition of the lands.

To this bill the defendant *Stephen Peer*, demurred on the grounds, that it appears by the said bill that there are not proper parties defendants thereto, inasmuch as it appears upon the face of the said bill that one *Jane Knapp* deceased left issue several children now living, none of whom are made parties to the said bill, and that it does not appear by the said bill in what

manner the said *Elias Fairchild Tryon* in the plaintiff's bill mentioned became possessed of or entitled to the lands in the plaintiff's bill mentioned, whether by purchase or by descent, devise or gift of some one of his ancestors, and that if by any of the latter modes then that he the said *Elijah Tryon* is of the blood of such ancestor.

1867.

Tryon  
v.  
Peer.

*Mr. Holmsted*, for the demurrer.

*Mr. Strong*, Q. C., *contra*.

Besides the cases referred to in the judgment, counsel cited and commented on *Bennett v. Bennett* (a), *Jackson v. Norton* (b), *Jerdein v. Wright* (c), *Parker v. Nickson* (d).

VANKOUGHNET, C.—In this case the plaintiff, by his bill, demanded partition as the heir-at-law of one *Elias Fairchild Tryon* deceased, by reason of his being a son of a half-brother of the intestate, and he, as such, claims to be heir equally with representatives of the whole-blood, made parties to the bill. The plaintiff alleges that he and these latter representatives and certain other representatives of the half-blood are the co-heirs and heiresses-at-law of the said *Elias Fairchild Tryon* deceased, who, he alleges, died, “leaving him surviving no issue, and no father or mother.”

Judgment

Partition is sought of a lot of land, of which, it is alleged, the intestate was, at the time of his death, seized in fee simple in possession. The bill does not allege that the plaintiff is the heir-at-law of the intestate in this particular lot.

(a) 8 Gr. 446.

(b) 4 Jur. N. S. 1067.

(c) 2 J. & H. 325.

(d) 7 L. T. N. S. 461.

1867.

Tryon  
v.  
Peer.

Section 4 of chapter 82 of the Consolidated Statutes of Upper Canada provides that "descent shall be traced from the purchaser," and "that for the purposes of the Act the person last entitled to the land shall be considered the purchaser, unless it be proved that he inherited the same."

Section 36 says, "relatives of the half-blood shall inherit equally with relatives of the whole-blood in the same degree, and the descendants of such relatives shall inherit in the same manner as the descendants of the whole-blood, unless the inheritance came to the intestate by descent, devise or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestors shall be excluded from such inheritance."

Judgment.

Now, a person who takes by gift or devise is a purchaser; and for aught that appears the intestate, though under the 4th section of the Act he is to be treated as a purchaser, may have been so by gift or devise from his ancestors. The defendant *Stephen Peer*, who is the husband of *Rosanna Peer*, described in the bill as of the whole-blood of the intestate, demurs to the bill because the plaintiff does not show how the intestate acquired this land, or does not negative that it came to him by descent, gift, or devise. As to lands coming to him by descent, I think that under the 4th section he is to be held *prima facie* as a purchaser, and that therefore it is not necessary in the bill to negative its coming to him in any other way than as purchaser. But, as already remarked, a person taking by devise or gift is a purchaser; and it does not appear that the intestate did not take or obtain the land in that way from an ancestor, and, if he did, plaintiff must make out that he is of the blood of that ancestor, before he can inherit. It is argued that this should be set up as matter of defence, as it is the exception from the general right, which as a co-heir

plaintiff has. I think not, however. The plaintiff professes to tell us how he is heir, and he does so by saying that the intestate having left no issue or father or mother he and others of the half-blood, with those of the whole-blood, are the co-heirs of the intestate, and then he demands partition of this particular lot. I think that on this mode of shewing his title, he should have gone on and stated that the lot had been so acquired by the intestate as to give him, the plaintiff, an interest in it as a co-heir of the half-blood. To prove simply what he has alleged would not, I take it, be sufficient to entitle him to a decree. The Court, before granting him partition, must be satisfied of his title; and this they could not be without first seeing that the land came to the intestate in such way as to entitle the relatives of the half-blood to it. The plaintiff, perhaps, need not have set out his title in particular; but when he does so he must shew a perfect one, as, under a general allegation of title he must prove one. *Parker v. Gerard* (a), *Cartwright v. Pultney* (b), *Jope v. Morshead* (c). Judgment.

1867

Tryon  
v.  
Peer.

The plaintiff might have contented himself by simply alleging that he was a tenant in common with others seised of the land; or perhaps that as one of the co-heirs he was with others seised of the land, and then proved his interest. But he does not do this. He does not allege that he is tenant in common in, or co-heir in the land in question, but contents himself with the allegation that he, as a relative of the half-blood, is a co-heir of the intestate, and that the intestate died seised of the land. It does not follow from this that the plaintiff has any interest in it, for it may have come to the intestate by gift or devise of an ancestor to whom plaintiff was in no way related. The statute is an innovation upon the Common Law, and for the first time gave relatives of

(a) Ambler, 236.

(c) 6 Beav. 213.

(b) 2 Atk. 380.

1867. the half-blood equal rights with those of the whole-blood in heirship, except in certain cases, and I think the relative of the half-blood must shew that he is not within that exception. 1 *Saund.* 276a. n. 2.

Tryon  
v.  
Peer.

Judgment.

I think the other objection for want of parties must also prevail. It appears that there are certain infant children of a Mrs. *Knapp* deceased, who are entitled as co-heirs in the same degree with the plaintiff, and they apparently are not made parties to the bill, although their father is, the plaintiff excusing himself from making them parties by a statement "that they reside with or near their father in the State of Iowa, in the United States of America, which is the most precise information of their place of residence your complainant has been able to obtain, although he has used due diligence and made inquiry to ascertain the same." It does not appear from this statement that there is any difficulty in serving these infants. Their father is made a party, and if he can be served they, "who reside with or near him," can be served. It is a general rule that all parties interested in the subject matter of a suit should be before the Court, and the plaintiff here has not brought these infants within any of the exceptions to that rule, on which the Court excuses the absence of parties.

Demurrer allowed with costs. Leave to amend as usual.

1867.

## BEATY V. GOODERHAM.

*Mortgage—Merger.*

*C.* being the sixth mortgagee, filed his bill against the holder of the equity of redemption and other incumbrancers. The prior mortgagees were not parties to the suit. A sale having been directed, was conducted by the Solicitors for one of the defendants, and *C.* became purchaser of the premises at a sum less than his mortgage debt. The conditions of sale contained the following clause:—"The said premises will be sold, subject to prior mortgage incumbrances, amounting in the aggregate to the sum of £1831." *C.* then bought up the three first mortgages and had them assigned to a trustee for his benefit, and in other respects shewed his intention to retain them as outstanding liens. He also entered into negotiations for time with the holders of the fourth and fifth mortgages, proposing as part of the terms, in case time were given him, to treat the first three mortgages as discharged. These negotiations failed. *G.*, the fifth mortgagee redeemed the fourth and foreclosed *C.* as owner of the equity of redemption. The three first mortgages having been assigned to the plaintiff—*held*, on a bill by him on them, against *G.*, that these three mortgages had not merged in *C.*'s equity of redemption, and that the negotiations between him and the present holders of the equity of redemption having proved abortive, could not be set up to bar the right of action of *C.* and his assignee upon these mortgages.

This was a suit for the foreclosure of three mortgages over the same premises in Streetsville. The plaintiff, *James Beaty*, was the assignee of the mortgages. The defendants *William Gooderham* and *James G. Worts*, had become owners of the equity of redemption of the mortgaged premises. The cause was heard and evidence taken at Toronto, during the spring term of 1866. Statement.

The facts are fully stated in the head note and judgment.

*Mr. Hector*, Q. C., and *Mr. C. S. Patterson*, for the plaintiff.

1867. *Mr. D. McMichael and Mr. A. Hoskin*, for defendants.  
 {  
   *Beaty*  
   *v.*  
*Goderham.*

The following authorities were referred to, *Finlayson v. Mills (a)*, *Elliott v. Jayne (b)*.

*Judgment.* SPRAGGE, V. C.—The plaintiff files his bill as assignee of three mortgages, the first in date is a mortgage dated 6th September, 1852, made by *John Street*, the owner of the mortgaged premises, called *Street's Grist Mill*, to *Timothy Street*, for \$412. *John Street* sold to one *Blain*, by whom the other two mortgages were made, they are both dated 30th December, 1854, one to one *Cordingly*, the other to one *Brooke*, each is to secure payment of \$400. The first of the above mortgages passed into the hands of *Schrieber*, the others into the hands of a Mr. *Savigny*. The several amounts due upon the above three mortgages were paid to *Schrieber* and *Savigny* respectively by *Richard Cuthbert*, and the securities were at his instance, and for his benefit assigned by them respectively to one *Murphy*, and by *Murphy* assigned to the plaintiff; no consideration having been paid either by *Murphy* or the plaintiff, and it is conceded that the plaintiff stands in the same position as *Cuthbert* would stand if he were plaintiff. *Cuthbert* is in truth the real plaintiff and *Beaty* the nominal plaintiff.

Other mortgages were made by *Blain*, one dated 18th November, 1854, to *John Street*, and by assignment dated 2nd February 1855, assigned to *William Oliver*. Mortgage—*Blain* to Messrs. *Gooderham, Worts, Howland and Wilmot*, dated 7th May, 1856. This mortgage covered other property besides that comprised in the other mortgages. Mortgage—*Blain* to *Cuthbert*, dated 13th December, 1856.

*Cuthbert* filed a bill against *Blain* upon his mortgage, the one last recited, and prayed for a sale, not making prior mortgagees parties. A sale took place, and *Cuthbert* himself became the purchaser—the date of his purchase being the 29th May, 1861. He thus became owner of the equity of redemption, subject to all the prior mortgages, among them, the three upon which this bill is filed.

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Subsequently to this, on the 6th of July, 1861, Messrs. *Gooderham, Worts & Co.* filed their bill upon their mortgage, against *Cuthbert* and *Blain*. Against *Cuthbert* as owner by his purchase of the equity of redemption of the land comprised in his mortgage—the *Street Grist Mill*; and against *Blain* as mortgagor, and still owner of the equity of redemption in the residue of the lands mortgaged to them: subsequent incumbrancers were made parties in the Master's Office, but the then holders of the three mortgages which are the subject of this suit were not made parties, nor was *Oliver*. The plaintiffs in that suit obtained a final order for foreclosure. *Cuthbert* put in his answer in that suit on the 6th February, 1862. It contains this passage, "the premises in the said bill mentioned were mortgaged by the said defendant *Blain* to divers persons, previous to the execution of the mortgage to the plaintiffs in the said bill mentioned, and which said mortgages are still outstanding and undischarged." The three mortgages in question were got in by *Cuthbert* between his purchase in May, 1861, and his putting in of the above answer; and the question is, whether he can hold them against the subsequent mortgage made by *Blain* to Messrs. *Gooderham, Worts & Co.*; or whether as the defendants contend he must be taken to have paid them off.

Judgment.

I have no doubt that *primâ facie*, the plaintiff or rather *Cuthbert* is right. It is settled law that a purchaser of

1867. an equity of redemption may get in prior incumbrances, and may keep them alive, and hold them against subsequent incumbrancers, and while the presumption is that a mortgagor getting in his mortgages intends to pay them off, the presumption is the other way when they are got in by a purchaser. In the former case merger would be presumed, but not in the latter. *Cuthbert* moreover took that course which is usual and proper, where a purchaser desires to keep alive the incumbrances which he may get in : he caused them to be assigned to a trustee for his benefit. The defendants therefore must rely upon something special, to take the case of this purchase out of the general rule.

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Judgment. What the defendants do rely upon is in substance this : *Cuthbert* after his purchase entered into negotiations with Messrs. *Gooderham, Worts & Co.*, with a view of obtaining from them an extension of time for the payment of their mortgage. He proposed to pay off the three mortgages in question in this suit, this was to be done at once. As to the mortgage held by *Oliver*, he was to make some arrangement with him, the precise terms of which are not material to the question. These negotiations which were partly with Mr. *Howland*, a member of the firm, and partly with the Solicitors of the firm, commenced before the filing of the bill by *Gooderham, Worts, Howland*, and *Wilmot* ; and were continued afterwards until, according to the evidence of Mr. *Hamilton*, who acted on behalf of *Cuthbert*, about the month of August in the same year. The answer in this suit states that upon these negotiations, papers and documents were prepared, and adds " but the same were never executed, and the said time was never extended."

The defendants insisted that *Cuthbert* engaged to pay off these incumbrances and assured them afterwards that they were actually paid off; and Mr. *Howland* gives evidence to that effect. But it seems clear to me that

this paying off was meant only in the popular sense, for 1867.  
 Mr. *Howland* himself shews that they were not to be  
 simply discharged, but were to be kept alive for some  
 purposes. To quote one out of several passages of his  
 evidence :—" I think it was the understanding that the  
 payment off of prior mortgages was to go as a payment  
 on account of our mortgage ; so that our mortgage would  
 be so much reduced and we should stand in priority in  
 the same position as the prior mortgagees. We should  
 thereby have gained priority over them to the extent of  
 the amount of these prior mortgagees." The very  
 object which *Gooderham, Worts & Co.*, proposed to  
 themselves would have been defeated if that had been  
 done which they now insist upon. All the evidence tends  
 to the same conclusion. Mr. *Hamilton* in his evidence  
 says that he insisted at the negotiation that the mort-  
 gages were still subsisting—that he is quite clear that  
 it was the intention to keep them on foot, and the form of  
 receipt given by holders of the mortgages agrees with  
 this. In the receipt given by *Schrieber* dated 3rd July,  
 1861, he agrees to discharge or assign when and as may  
 by *Cuthbert* be required ; and in two receipts given by  
*Savigny*, one dated 15th July, 1861, the other 1st  
 October, 1861, there is the like undertaking.

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Judgment.

But further, if *Cuthbert* had undertaken ever so ex-  
 plicitly to pay off these mortgages and not to keep  
 them alive, it could not avail the defendants for what  
 passed in this respect was in the course of negotiations  
 which came to nothing, with a view to an extension of  
 time to *Cuthbert* which the defendants themselves say  
 was never made. Mr. *Howland* says " I think we found  
 it necessary to proceed, because *Oliver* was not settled  
 with, and took proceedings or threatened to do so." It  
 is suggested that the answer of *Cuthbert* was not pressed  
 pending these negotiations, and this probably was the

1867. case as it was not put in till seven months after the filing of the bill.

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In the meantime *Savigny* continued making his payments on the mortgages; three at the dates of receipts which I have referred to, and the last on the 13th of December, 1861. The assignment, *Schrieber to Murphy*, was made 3rd of July, 1861; *Savigny to Murphy*, 21st February, 1862: so all the payments were made before *Cuthbert* put in his answer, and this it is apparent from the evidence was known to the plaintiffs, and one of the mortgages had been assigned to his trustee, and the others were not yet assigned; and there was, besides, the mortgage in the hands of *Oliver*. There was nothing, therefore, in his answer as to mortgages being outstanding which ought to prejudice him. It was a piece of pleading not untrue in fact, and could not possibly mislead the plaintiffs.

**Judgment.** The defendants say in their answer that they redeemed *Oliver* upon the faith of the statements and representations of *Cuthbert*. This is not supported in evidence, and, indeed, does not agree with it, for *Cuthbert* was to arrange with *Oliver*, not *Gooderham, Worts & Co.* to redeem him. The defendants pray no relief in respect of this mortgage, nor is it indeed proved in the suit. From the tenor of their answer, in which they state that they had made large improvements upon the mortgaged premises, and insist that if they are put to redeem the mortgages in question, they are chargeable with not more than six years' arrear of interest, I infer that if the point raised by them in regard to the payment off of these mortgages should be decided against them, they desire to redeem. I think the plaintiff entitled to the usual decree with costs.

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## KIRKPATRICK V. LYSTER.

*Lease by Rector—Renewal—Covenant to pay for improvements—Estoppel.*

By Letters patent dated in January, 1824, certain lands were granted to three parties upon the trust, amongst others, to convey the same to the Incumbent, whenever the Governor should erect a parsonage or rectory in Kingston and duly appoint an incumbent thereto, such conveyance to be upon trusts similar to those thereinbefore expressed. In January, 1836, a rectory was created in Kingston. In May 1837, the trusts for which the patent of 1824 had been issued, having been carried out, and one of the trustees named therein appointed Rector, the other two joined in a conveyance to him as such Rector, to hold to him and his successors, subject to the uses and trusts set forth in the grant to them. In 1842, this Incumbent created a lease for twenty-one years (under which the plaintiffs claimed), whereby he covenanted for himself and his successors to pay for certain improvements made by the lessee on the premises, or that he or they would execute a renewal lease on terms to be agreed upon, and that until such payment for improvements or renewal of lease, the lessee should retain possession of the premises.

*Held*, that the Incumbent either as Trustee or Rector had no power to bind his successors to pay for improvements, or to enter into any agreement which *a priori* would extend the lease beyond the twenty-one years.

*Held also*, that the mere demand of rent by the successor of the lessor (after the expiration of the twenty-one years) was not such an affirmance of the covenants in the lease as could estop him from disputing them.

The bill in this case was filed to restrain the defendant from proceeding to enforce the judgment recovered by him in ejectment against the plaintiff as reported in the reports of the Court of Queen's Bench, volume 26, page 217, where the facts of the case and the several grants and conveyances are so fully set out as to render any statement of them here unnecessary. Statement.

The cause came on for the examination of witnesses and hearing before the Chancellor at the sittings of the Court in Kingston, in the spring of 1867.

1867. Mr. *Strong*, Q. C., and Mr. *Crooks*, Q. C., for the  
 plaintiffs.

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 v.  
 Lyster.

Mr. *Blake*, Q. C., for defendant.

VANKOUGHNET, C.—The bill in this case has been filed to establish the plaintiff's right to the benefit of certain covenants in a lease, and to restrain the defendant from proceeding upon a judgment recovered by him at law in ejectment. In the suit at law all the facts, material to the question here, appeared and were canvassed, and by the Court considered in an elaborate judgment pronounced by the learned Chief Justice of the Queen's Bench, as reported in volume 26, U. C. Reports, page 217. I need not recapitulate these facts here.

Jndgment. The contention of the plaintiff here is, as I understand, that, though the term created by the lease from Dr. *Stuart* to *Forsyth*, has expired, yet, that by reason of the covenants in it, that the lessor and his successors shall pay for certain improvements which have been made by the lessee, in the shape of a stone building upon the premises, to be ascertained by the valuation of arbitrators, and that until such payment or until a renewal of the lease on terms to be agreed upon between lessor and lessee, the latter and his assigns shall retain possession of the premises, and because no such valuation or renewal has been had, the defendant here, the plaintiff at law, should be restrained from ousting the assignee of the lessee. The Letters Patent provide that whenever the person administering the Government of Upper Canada shall erect a parsonage or rectory in Kingston, and “present to such parsonage or rectory an Incumbent or Minister of the Church of England, the trustees, grantees in the letters patent, shall convey the land, &c., to such Incumbent or Minister and his successors for ever, as a sole corporation to and for the

same uses and upon the same trusts as are therein before mentioned in the patent." A Parson or Rector is said to be a Corporation sole. In such of the United States as adopted the religious establishment of the Church of England and the common law on that subject, the Minister of the parish was seized of the freehold in Church property as was a Parson in England, and it went to his successors, and continued to do so after the revolution. (a)

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Looking at the recitals in the patent in connection with this provision for conveyance to the Incumbent, I think that the Crown meant that the "sole Corporation" was to be the Rector or Incumbent, and none other; that is, that no new or other Corporation was meant, or intended, or created by the grant. A Corporation sole may be a trustee; and therefore the Rector here and his successors may, under these letters patent, be a trustee, and compelled to discharge any trusts imposed upon them as such, by the patent. It is contended that the Rector, though he now has in him all the legal estate formerly vested in the trustees—for, since the action at law, the heir of the late Dr. *Stuart* has conveyed and released to the defendant here, the Rector, all the estate which descended upon him at law—is nevertheless a trustee, as was the lessor Dr. *Stuart* under the letters patent, and is not in as Rector; and that as trustee, Dr. *Stuart* had power to make the covenants referred to, so as to bind his successors. It is quite clear that *qua* Rector he could not thus bind his successors. The Court of Queen's Bench seem to be of opinion that all the trusts intended to be imposed upon the Corporation sole, the Rector, had been discharged prior to the execution of the lease, and that Dr. *Stuart* was in as to two-thirds of the estate as Rector freed from any trusts;

Judgment.

1867. the other one-third vesting in him as a bare trustee, and descending at law to his heir, inasmuch as he had taken no means to rid himself of it except by a declaration under seal that it was vested in himself as Rector—an act of no effect. Still, it would not follow that, though the whole estate was vested in him as Rector, he would not still, as such, be trustee under the letters patent, and with the powers thereby given to such trustee. The Court of Queen's Bench, as I have already stated, think that the Rector is no longer a trustee for any purpose. It is said, however, by counsel here, that, though the main purposes of the trust were discharged before the execution of the lease, and before the release by two of the original trustees to the other trustee, Dr. *Stuart*, yet, that the powers given to the trustees continued in the Rector and enabled him therefore to make, within the scope of those powers, covenants and conditions binding on his successors, which, as Rector simply, he could not have imposed; and, it is also said that one of the objects of the trust may, at some future time, be enforced, viz., the paying over of the rents to the clergyman for the time being who shall be *resident* and *doing duty* in the Church provided for by the letters patent; and that it does not follow that this officiating clergyman must be the Rector, as he may, for cause, be debarred from doing duty as a Minister, though there may be no right to deprive him of the temporal advantages which as Rector simply he would have; and that for this reason, if for no other, the trust must be continued. In answer to this latter position it may be said that the resident clergyman referred to as doing duty is, by the patent, intended and shown to be the Rector or incumbent inducted from time to time. Admitting, however, that the Rector is still a trustee, possessing the powers conferred upon the original trustees, I am nevertheless of opinion, that, as such trustee, he could not enter into the covenants insisted upon. The trustees were to

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Judgment.

ratify and confirm certain existing informal leases—and 1867.  
 “also to demise and lease the residue of the ground together or in parcels, for the best rent that can be obtained therefor for any term not exceeding twenty-one years, and under and subject to such provisoes, conditions and covenants, and to renew the same or to grant fresh leases at the expiration of such as now are or thereafter may be granted, as to the said trustees or any future trustee, &c., shall seem fit, and to receive the rents of the whole of the said land, and apply the same in the first place in the liquidation of any sum not exceeding £3000, which may be borrowed towards erecting the new Church; and when and so soon as the same and the interest thereon shall be paid off, upon trust to pay the rents, issues and profits of the said land to the clergyman for the time being.” It does not appear whether the piece of land in question here had ever before been leased or not. I do not know that this would make any difference, but, at present, it would seem to fall within the “residue” of the land which the trustees were authorized to lease for any term not exceeding twenty-one years. The effect of the covenants in question is this: that either the successor of Dr. *Stuart*, who entered into them, must pay out of the rents and profits coming to him as such successor, the value of the buildings which the lessee has erected, and which may absorb the rental of many years, or that the lessee may remain in possession upon the old rental until the valuation is paid, or a new lease is executed between the parties, upon terms, *to be agreed upon*—the lessor or his successor having but one option merely, that of paying for the buildings at a valuation; for he cannot force the lessee to accept a new lease upon any terms which the latter does not agree to. It seems to me that this provision is improvident and unusual, and not such an ordinary covenant as a lessor could be called upon to give. The lessor must under it pay the valuation, however extravagant it may be, to get the lessee

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 v.  
 Lyster.

Judgment.

1867. out of possession and put an end to the old lease and rental, unless the lessee chooses to accept a new lease upon altered terms. I think the covenants also are not within the powers given to the trustees. I think they could not enter into any arrangement which would *a priori*, extend the original lease or rental beyond the twenty-one years. Yet this in effect has been attempted to be done by the provision for the continuance of the possession by the lessee after that period at the old rental. I also think that they could not compel the successor of the Rector or the officiating Minister to appropriate the rents coming to him to the payment of improvements. These rents, after paying off the £3000, were to be paid to the Rector or Minister for the time being. The trustees could not, I think, have collected them and paid them to the lessee for improvements; and if they could not do it themselves, they could not impose that obligation upon the Minister or Rector. The lessee dealt with his eyes open. He trusted to the legal right of Dr. *Stuart* to make the covenants; and against his estate is, I think, his only recourse. So that whether Dr. *Stuart* held merely as Rector, or whether he held as trustee, I do not see how I can give the plaintiff any relief, and I accordingly dismiss the bill with costs. I do not think that a mere demand of the rent was such an affirmation of the covenants in the lease as to estop the Rector from disputing them. It is not pretended that thereby a new term or lease has been created such as the plaintiff would accept in satisfaction of the claim for improvements. The plaintiff must be liable to pay at least the old rental for the period of occupation since the term expired; and if he had done this and the Rector had accepted it, the latter, I suppose, could not claim anything more in the shape of rent; but it does not appear that any rent has been paid to the defendant.

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Lyster.

Judgment.

1867.

WASON V. CARPENTER.

*Execution creditor—Injunction—Mortgage.*

Where a mortgagor in possession was felling timber on the mortgage premises, the Court at the instance of a judgment creditor of the mortgagor, with an execution against lands in the hands of the Sheriff, granted an injunction to restrain future cutting, by the mortgagor, his servants, agents and workmen, it being shewn that the property was a scanty security for the claims of the mortgagees and the amount due the execution creditor.

This was a motion for an injunction to restrain the defendant from cutting or removing timber already cut on the lands in the possession of defendant. It appeared that defendant had created two several mortgages on the property; that the plaintiff had recovered judgment against defendant upon which an execution against lands had been duly issued and placed in the hands of the proper Sheriff. The affidavits filed upon the present motion shewed that defendant being in possession of the mortgage premises, had commenced felling the timber and other trees growing thereon for the purpose of sale; and had also entered into a written contract of the sale to other persons (not parties to the suit) of certain portions of the timber on the lands and which it was alleged those parties were about to cut. Statement.

Mr. *Crickmore*, in support of the motion, read affidavits shewing that the property was a scanty security for the mortgagees and the amount due plaintiff; and that if the timber should be removed, the value of the premises would be reduced so materially that nothing would be realized by the plaintiff on his execution.

Mr. *Barrett*, contra, contended that the mortgagees should have been made parties, and that plaintiff was not in a position to obtain this relief, but

VANKOUGHNET, C.—Thought that under the circumstances the injunction should go as against the defend- Judgment.

1867. ant, his servants, &c., to restrain any future cutting; but not to interfere with the removal of that already cut. The parties to whom the defendant, it is alleged, has made sale of the trees on the lands, however, would not be affected by such injunction.

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v.  
Carpenter.

### WIGHTMAN V. HELLIWELL.

#### *Trustee—Rests—Evidence.*

The principle on which trustees are liable to be charged with an increased rate of interest, or interest with annual rests considered and acted on.

Where a trustee had retained moneys of the estate in his hands instead of paying off debts of the estate, and had improperly mixed these moneys with his own at his Bank, the Court without saying what in future, according to the value of money or the amount of interest payable on investments might be a fair rate to charge on moneys improperly withheld or used by a trustee, charged the trustee with interest at eight per cent. on all balances in his hands.

In a suit against a trustee to carry out the trusts of a deed for the benefit of creditors a payment to the plaintiff was proved by the evidence of the trustee only; although this was considered sufficient to discharge the estate from liability in respect of this sum, still he could not thus discharge himself from liability for the amount to the plaintiff.

#### Statement.

The bill in this cause was filed to carry into effect the trusts of a deed executed by one *Charles Bolton*, deceased, to the defendant *Helliwell*, for the benefit of certain creditors of the settlor. It appeared that the plaintiff had recovered judgment against *Bolton* upon a confession for a sum which, it was alleged, was greatly in excess of the amount due.

At the hearing a decree was made which, amongst other things, directed the Master to take an account of the moneys received and expended by *Helliwell* on ac-

count of the trust estate and of the amount due to the plaintiff. By a subsequent order made on the application of the plaintiff the reference was changed from the Master to the accountant who, by a report dated the 2nd of August, '1866, found, amongst other things, that *Helliwell* had received on account of the trust estate \$8,032 61, and had expended thereout \$5,418 37, leaving a balance in his hands of \$2,614 24, for principal moneys; and having taken the accounts of *Helliwell* with annual rests he found the interest to amount to \$1,165 78, making in all \$3,780 02 chargeable against him.

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The accountant also found that at the date of the trust deed there was due from *Charles Bolton* to plaintiff \$3,318 85, and that *Helliwell* had paid to plaintiff \$5,230, and he computed interest on the moneys due by *Bolton* from the time the same respectively became due to the date of the report, and set off against such interest, interest on the money so paid to him; and found that there was due to the plaintiff on the balance of such interest \$703 78, which being added to the amount due plaintiff at the date of the trust deed, made together \$4,022 63, which being deducted from the amount paid plaintiff left a balance of \$1,207 37 over-paid to plaintiff. The accountant also reported that largesums of money, alleged to have been received by *Charles Bolton* from purchasers of portions of the trust estate by permission of *Helliwell* and which had been expended by *Bolton* in repairs and in the erection of a house on the premises, had been disallowed to *Helliwell* and charged the same against *Helliwell* as moneys which he ought to have received.

From this report the plaintiff appealed for the following amongst other reasons:—

1. In finding that the defendant *Helliwell* had expended out of the sum of \$8,032 61 received by him as

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Helliwell.

1867. trustee of *Charles Bolton* in the pleadings mentioned, the sum of \$5,418 37, firstly, because such last mentioned sum comprises the payment on the 16th day of June, 1860, of the sum of \$300 to the plaintiff, whereas the defendant *Helliwell*, in his supplemental account, and the defendants the executors of the said *Charles Bolton*, in their sur-charge only claim to have paid the said plaintiff on the 16th day of June, 1860, the sum of \$100, that being the only sum found by the said accountant in schedule B to his report to have been received by the said plaintiff on that date; and secondly, because the said sum of \$5,418 37 further comprises the payments to the plaintiff on the 28th day of March, 1861, of the sums of \$200 and \$200, whereas the plaintiff alleges that the sum of \$300 or \$100 (as the case may be) was not paid to him or to any one on his behalf, and the said two several payments of \$200 each are credited and comprise the sum of \$400 charged by the said defendant *Helliwell*, and admitted by the said plaintiff on the 20th day of March, 1861.

2. In finding the sum of \$2,780 02 to be due from the said defendant *Helliwell*, at the date of his report, whereas such balance ought to be increased by the above mentioned sums of \$300, \$200 and \$200, making the sum of \$700 with interest thereon, wrongfully allowed to the said defendant *Helliwell*, as payments made by him to the said plaintiff.

3. The plaintiff also excepted to the report in respect of his claim under the said trust deed of the said *Charles Bolton*, and the principle upon which the finding of the accountant was based, and the mode of calculating interest and applying payments as shewn in Schedule B annexed to the said report, for the reason that the said accountant had on the one side calculated interest on the sales by the said *Charles Bolton*, and on the other side had also calculated interest on the payments made

to the plaintiff in each case down to the date of his report, and had deducted the payments with the interest thereon from the said sales with the interest thereon; whereas the accountant should have allowed the plaintiff to have applied each payment when received in satisfaction of any interest due, and the balance, if any, in reduction of the principal.

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Helliwell.

4. In finding that at the date of the said trust deed there was due from the said *Charles Bolton* to the said plaintiff the sum of \$3,318 35, whereas it should have been for principal \$1,239 48, and for interest \$180.

5. In finding that the defendant *Helliwell* had paid to the plaintiff the sum of \$5,220, whereas, as shewn in the first of the above exceptions from that sum, ought to have been deducted the several sums amounting to \$700 with interest thereon.

6. In finding that the balance of interest due to the plaintiff was \$703 78, whereas at page 15 of the said report the accountant finds the interest of the sales to amount to \$6,025 80, and at page 13 interest on moneys received to be \$1,912 50, leaving (if the principle on which the calculations are based is correct in other respects) a balance of interest due to the plaintiff of \$1,113 30. Statement.

7. In finding that the plaintiff had been overpaid the sum of \$1,207 37, whereas if the said calculations are based on a correct principle (which the plaintiff denies) he has been overpaid as shewn in Schedule B at page 15 of the said report, the sum of \$597 07 only; but the plaintiff claimed that if the calculations were made upon the principle contended for in the above exception No. 3, there would be found due to him at the date of the said report the sum of \$89 59 for principal, and \$236 09 for interest, inclusive of the payment

1867. alleged to have been made to the plaintiff of \$500, and objected to in the first exception.

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Helliwell.

8. In finding, as shewn in Schedule B to the said report, that the plaintiff received payment on the 16th day of June, 1860, of the sum of \$100, on the 28th day of March, 1861, \$200, and on the 4th day of June, 1861, \$200, whereas the said sum of \$100 was not paid to the plaintiff nor any one on his behalf, the only evidence of such payment being an unindorsed cheque payable to *George Wightman* or bearer, and there being no sufficient evidence to prove such payment; and whereas the two sums of \$200 and \$200 were in fact credited by the plaintiff on the 20th day of March, 1861, when a note of the defendant *Helliwell's* for that amount became due, and it having been previously discounted at the request of the plaintiff by one *Crosley*, it was treated as paid on that date as between the estate of the said

Statement. *Charles Bolton* and the plaintiff in the account brought in by him under the decree in this cause, but was not in fact paid until the 28th day of the said month of March by \$200 in cash and a renewal note for \$203 20 (by an error in the Schedule to the said report entered as \$200 only), as by the evidence before the said accountant appears.

9. The plaintiff also excepted to the said report on the grounds that the accountant had not allowed him interest on his sales with annual rests, and had not, on the 19th day of March, 1852, found that the said *Charles Bolton* was indebted to the plaintiff at that date in a sum equal to the sum of £1,460 0s. 10d., whereas on that date the account was settled between the said parties, and that amount admitted to be due, and in the account then settted by the said *Charles Bolton*, and subsequently delivered to him, as is the custom with merchants, annual rests, were charged as by the evidence and accounts laid before the said accountant appears.

10. That the accountant had refused to allow to the plaintiff for costs at law, and for a certain foreclosure suit in equity against the said *Bolton* and one *Hall*, incurred in respect of the transactions arising out of the subject matter of the said indebtedness of the said *Charles Bolton*, and paid by the plaintiff to his Solicitor, *John Roaf*, Esquire, as proved before the said accountant. 1867.

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11. In finding that the plaintiff had been overpaid at the date of the said report by the sum of \$1,207 37, whereas there was still due to the plaintiff in respect of the indebtedness of the said *Charles Bolton*, the sum of \$1,791 31, as appeared by the Schedule thereto. Statement.

Mr. *Blake*, Q. C., and Mr. *Hector Cameron*, for the plaintiff.

Mr. *Strong*, Q. C., for defendant *Helliwell*.

Mr. *Gwynne*, Q.C., for the infant children of *Charles Bolton*.

Mr. *Fitzgerald* and Mr. *A. Hoskin*, for the executors of *Charles Bolton*.

Mr. *Curran* for judgment creditors.

VANKOUGHNET, C.—The decree in this case is based on the trust deed of 28th July, 1854, the trusts of which it directs to be carried into execution, with a provision that the Accountant is to take an account of the plaintiff's claim without reference to the judgment at law of the plaintiff, so far as the amount thereof is concerned. This amount was in dispute between the plaintiffs and the settlor, and the Court of Law had directed an inquiry as to the true amount for which this judgment at law, obtained on a *cognovit actionem*, should stand. The trust deed made after this inquiry directed at law recognised the plaintiff's judgment at law, and, after securing Judgment.

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1867. the payment of all expenses attending the creation and execution of the trust, provided for the payment of it, and of two other judgments of *Jacques & Hay* and of the City Bank, respectively by the distribution of the assets *pro rata* among these creditors on the amounts of their several judgments, and for the payment over of the balance, if any, to the settlor.

Judgment. The trust deed does not provide for the payment of any claims, except those covered by the judgments. Nor does the decree. The plaintiff claims that the Accountant should have so taken the account as to have applied the payments from time to time made by the settlor to him in reduction first, of interest, and then of principal, and that this interest should have been calculated on the balances at the end of every four months, according to the course of dealing which had existed between the two parties in trade as merchants. I think that the Accountant should have ascertained the true sum due to the plaintiff upon the cognovit, and for which he was entitled to enter and enforce his judgment at law. That judgment has never been set aside, and all the decree directs is that the Accountant shall disregard it, *as to the amount thereof*. The amount which the plaintiff ought to hold it for being ascertained, it would, from the time of the judgment bear interest at six per cent., and the plaintiff would thus be put upon the same footing as the other judgment creditors mentioned in the trust deed. In ascertaining this amount, the Accountant should have reference to the previous course of dealing between the parties; and this seems to me to be established by the accounts rendered to, and submitted to by, *Bolton*, the settlor and debtor, and the promissory notes given by him from time to time in settlement of the balances. Compound interest may thus become the subject of contract between traders enforceable by suit. There may however be other evidence which I have not seen to rebut the existence of such an arrangement between

the parties. The Accountant can consider this in recasting the account. 1867.

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Helliwell.

With regard to the double receipt by plaintiff of a sum of \$400, complained of in the notice of appeal, upon consideration of the whole evidence, I am of opinion that the plaintiff should only be charged with one such sum. The plaintiff charges himself with \$400 as paid to him on the 20th March, 1861. The executors of the deceased settlor, and *Helliwell* the trustee, finding that sum so admitted, claim that the plaintiff should be charged with it, and with two other sums of \$200, and \$203.03, paid to the plaintiff by cheques of *Helliwell*, dated respectively the 28th March and the 4th of June, 1861. The plaintiff says that these cheques were in payment of a \$400 note, with which he charges himself as with cash received on the day it fell due, viz., 20th March. In the plaintiff's accounts only one such sum of \$400 is admitted, and his accounts appear to be made up from his books, which being brought into the Master's office shew that this \$400 was the amount of a note for that sum due on the 20th March. *Helliwell* swears he does not recollect any such note, but he does not swear that besides paying this note, he also paid plaintiff the two cheques above referred to, or any other sum of \$400. Now in the plaintiff's account in the items, one entered above and the other below the entry of the receipt by him of the \$400 as cash, are receipts of \$200 each (having nothing to do with this \$400 transaction), which undoubtedly, upon the explanations to me of both parties, are though entered or treated as cash, the amounts of notes then due, shewing that the plaintiff treated as cash, notes at maturity which were subsequently settled. *Helliwell*, in his evidence, says, "some of the payments in my first account filed, marked A., February 10th, 1865, called 'cash paid plaintiff,' were paid by note, some were paid in cash, and some renewed. On renewing, I think, I got the renewed notes up

Judgment.

1837. generally." Thus, both parties treated notes matured as cash, though they may both have been renewed. Had the plaintiff entered in his account this sum of \$400 as a note paid by *Helliwell*, he would have been in no difficulty; but because he has done, as *Helliwell* himself did, treated this note as cash paid him, because, as he alleges, it was paid partly in cash and partly by renewal, the executors seek to charge him with it as a sum of cash received independently of any note. *Helliwell* will not swear to this. He merely does not recollect the note for \$400, because he cannot find it; but he does not pretend that he has kept all the other notes given in the matters of the trust and which he has retired; nor does he pretend nor does it appear that he ever at any one time paid plaintiff \$400 in cash. I think it was open to the plaintiff to afford explanation of how he entered this sum as cash; and I think this explanation is made out by the circumstances already adverted to, and by

Judgment. the form and date of the note said to have been given in renewal, and the cheque in part payment. It is true, the renewal was not given for some days after the alleged \$400 note fell due, but then it is given for an amount—\$203.03, which would seem to cover the interest for those few days and the discount. So also the cheque was not given till the 28th of March; but then we know, from the evidence, that *Helliwell* did not pay or arrange his notes punctually, and this very note for \$203.03 was not paid for some days after maturity, when a cheque for an amount sufficient to cover it and the interest for the few days it was overdue was given. The note for \$203.03 is dated the 27th March, and the renewal was most probably completed on the 28th of March, the day following, when the cheque bears date. Then comes the evidence of *Crosley*, which, though not as distinct as, from the character of it, I think it might have been made, shews that he discounted a note for the plaintiff for \$400, in December, 1860, and that it became due in March, 1861. He says "some days afterwards

the plaintiff paid me \$200 in cash, and discounted another note signed by *Helliwell* for \$203.03." He does not say that the note for \$400 was made by *Helliwell*, nor that the \$200 and the note for \$203.03 were in renewal of it, but I take it that this is what he meant and that the parties, on his examination, so understood it. He was not cross-examined. All doubt on this, if either party desire it, may be cleared up on his re-examination. In addition to all this, *Helliwell* kept no books; has no entry of two sums of \$400 paid plaintiff; will not swear positively to anything in relation to it, and says he can only speak from vouchers in the shape of cheques and notes which may or may not have been in part payment or renewals. I think it clear that the note for \$203.03 was a renewal of some other note, and unless it be applicable to the note for \$400, no other application of it is shewn. The plaintiff's books would not of themselves be evidence in his favor of anything; but when it is sought to charge him by his admission in his accounts, merely, of the receipt of a sum of \$400, and this account has been made up from his books, he may shew by them to what \$400 he referred, and substantiate this by other evidence, as he does here. I think, therefore, he should be charged only with the one sum of \$400, and that in this respect the Accountant's report must be corrected, leaving it open to all parties to adduce further evidence in regard to it.

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Helliwell.

Judgment.

*Helliwell's* evidence is most unsatisfactory. No doubt he speaks conscientiously, or he might have made a stronger case in his own favor, but he admits in effect that he remembers nothing of the transactions, and has no books by which to refresh his memory, and can only speak from vouchers in the shape of notes and cheques, the appropriation of which he cannot account for.

With regard to the \$100 cheque of the 16th June, 1860, the evidence is first, that the cheque is payable to

1867. *Wightman* or bearer, not to his order, and secondly, that it passed through the Bank and was paid. This is no evidence that it was received by or paid to *Wightman*; not evidence even to be submitted to a jury or any one else, for if it were, any man might obtain the chance of proving payment to his creditor by inserting his name in the cheque, though it was paid away to some one else, or the money procured on it by the drawer himself. But there is the evidence of *Helliwell* himself, who swears that he paid the cheque either to Mr. *Wightman* or to some one for him on account of the *Bolton* estate. He says, "my reason for saying it was so paid is that I had no other transactions with *Wightman* except about the *Bolton* estate, and I should never have put his name on the cheque unless it was paid to him or some one on his account on the *Bolton* estate. It might have been given for a renewal, or it might not. I cannot say. I am not usually in the habit of making my cheques to order,"

*Judgment.* and so on. Now, I think on this whole case, the Master was justified, as a jury might have done, in finding that *Helliwell* had paid this \$100 to *Wightman*. If it was paid in renewal of a note, or for a note, then it lay on *Wightman* to shew this. *Helliwell's* evidence from his want of memory and absence of account, is not very reliable, but there is no pretence that he was guilty of any deliberate fraud, or concealment of truth so as to impeach his credibility. *Wightman* might have shewn, perhaps, that this cheque was on account of a note, or if all his moneys were paid into a Bank, that it would have appeared to his credit there, and thus have effectually shaken or displaced the not very positive testimony of *Helliwell*; but, in the absence of any such circumstances, I will not disturb the Accountant's finding so far as it affects the *Bolton* estate; but, only so far, because while I consider *Helliwell's* evidence receivable to discharge it, it cannot discharge himself. I think he is a good witness for the estate or its representatives. He was the chosen agent of both parties, the plaintiff and

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his debtor, and on the most ordinary rules of evidence from the earliest times, he would and must be a good witness for the one or the other. If the plaintiff was suing the settlor at law for an alleged balance, *Helliwell* would be a good witness to prove how much the plaintiff had received out of the trust estate devoted to pay him. The mere circumstance of the inquiry being here, and that *Helliwell* is necessarily a trustee, and accounting party cannot—ought not, to affect the right of the estate to his evidence. It would be monstrous that it should. He, the man dealing between and for the two parties—the trustee, the agent of both—must surely be a witness between them, whatever the form of proceeding may be. But, while he may discharge the estate from liability in respect of the \$100, he cannot thus discharge himself; and he must remain liable to the plaintiff for it, as his trustee, unless he can free himself by other evidence, which I permit him to give under this reference back.

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Helliwell.

Judgment.

As to the costs in other suits than those on the judgments at law referred to in the trust deed, I think they should not be allowed. The trust deed does not provide for them, neither does the decree, which in no way extends the operation of the trust deed. They cannot be allowed as against the other judgment creditors who are to be paid *pro rata*; and, if it is sought to fasten them, or any other claim upon the surplus coming to *Bolton's* estate, this must be effected in some other way.

The admitted error must be corrected; and the Accountant must find as directed by the decree, the proportions of the fund payable rateably to each of the judgment creditors.

I think the costs of all parties on this appeal should be paid out of the estate.

1867. The defendant *Helliwell* also appealed from the report on the following amongst other grounds :

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Helliwell.  
Statement.

1. That the Accountant had improperly made up the amount of money received by the defendant *Helliwell*, with annual rests, whereas he ought not to have charged him with any interest at all.

2. That the defendant *Helliwell*, ought not to be charged with money expended on the estate

3. That the Accountant had allowed the plaintiff the costs of the suit, *Wightman v. Bolton and Hall*, which were kept out of the moneys paid by *Hall*, and ought to be credited to *Bolton* in his account with the plaintiff.

4. That the Accountant ought to have allowed the defendant *Helliwell* seventeen pounds returned to *A. Bolton*, on his giving up his lot.

5. That the Accountant should have allowed the defendant *Helliwell*, a reasonable allowance and remuneration for his time and trouble in managing the estate.

The same counsel appeared for the parties respectively. Amongst the authorities cited were *McGregor v. Gaulin* (a), *Bates v. Farewell* (b), *Barnum v. Turnbull* (c), *Landman v. Crooks* (d), *Small v. Eccles* (e), *Clancarty v. Latouche* (f), *McCarty v. Llandaff* (g).

Judgment.

VANKOUGHNET C.—In taking the accounts the Accountant has charged the trustee with rests. *Helliwell's* duty was, so soon as he received money, to distribute it

(a) 4 U. C. Q. B. 378.

(b) 15 U. C. C. P. 450.

(c) 13 U. C. Q. B. 277.

(d) 9 Gr. 178.

(e) 12 Gr. 37.

(f) 1 B. & B. 420.

(g) 1 B. & B. 375.

among the judgment creditors named in the trust deed, and for any loss, not speculative, but such as the law usually recognizes, which the estate or these creditors sustained by reason of his neglect to do this, he should be made responsible. He conducted the affairs of the trust most carelessly, keeping no books, and mixing the moneys, produced by the sales of the property, with his own moneys in his account at the bank, and otherwise. Great difficulty has, in consequence, been experienced in getting at the true account of receipts and expenditures and the dates of both. *Helliwell* was not in trade. He was a Solicitor, and, as such, must be taken to have known the rules of this Court in regard to the execution of trusts and the duties of trustees. Had he been a trader, there could have been no doubt that he would or might have been charged with compound interest, and at a rate perhaps higher than six per cent., for in England compound interest, at the rate of five per cent is charged, though the ordinary rate there is four per cent. and the lowest here is six per cent. I agree generally in the statement by Mr. *Strong* of the practice or rules which regulate the rate of interest to which defaulting trustees are in England made liable. When a trustee merely retains money in his hands without using them, but might have invested them or paid them over at once, so as to enable the party entitled to them to invest them, he is charged the usual rate of interest which investments in England bring, viz.: four per cent. When he, not being in trade, uses the money, or is guilty of something more than the mere negligence of permitting it to lie idle, as by not obeying the directions of the settlor to invest, or by committing some positive breach of trust, he is generally charged five per cent. When, being in trade, he has used the money or paid it into his own bank account, thus giving himself a false credit, or title to increased credit or bank accommodation in his business, he will, if not charged with a share of the profits of the business in which he has used, or is treated as having used

1867.

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Helliwell.

Judgment.

1867. the trust moneys, be charged with compound interest at the rate of five per cent., the highest rate of simple interest ever imposed in England in such transactions, it having been until recent years the highest legal rate of interest permitted there. So, if there be an express direction to accumulate interest, the trustee, neglecting this, will be charged with compound interest. The principle and the object in every case is to make good the loss caused by the acts of omission or commission of the trustee, or to wrest from him any benefit he has, or is taken to have, derived from the use of the trust moneys. Now, applying this principle here, viz.: the principle of compelling the trustee to make compensation to the different sets of *cestuis qui trustent* for his breach of trust in not having paid over moneys as received, what is the loss which they may fairly be said to have sustained thereby? The settlor's estate cannot at present, perhaps at any time or in any way, be said to have sustained loss by this default of the trustee; or loss, which will not, at all events, be met by the charge of simple interest, which is all that the *cestuis qui trustent*, the judgment creditors, can impose on it, while their judgments remain unpaid. But these judgment creditors, have they not sustained a loss by not getting the moneys retained by *Helliwell*? It is said that six per cent will compensate them, as that is the only rate of interest payable on their judgments. That may be so as between them and the settlor, but as between them and *Helliwell*, they are entitled to have this interest paid, so soon as the latter had moneys in hand, and to have the principal from time to time reduced in like manner. These judgment creditors consist of two parties in trade, who may be supposed to require bank accommodation occasionally, or to whom an increased and increasing bank credit account would be an object,—and of a bank. Now, the banks are permitted to charge seven per cent interest. Is it too much to say that the judgment creditors, traders, had they received their moneys promptly from *Helliwell* would have required just

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v.  
Helliwell.

Judgment.

so much less bank accommodation, for which they had to pay nominally seven per cent, but in reality more by reason of the discount being deducted in the first instance; and has not the bank, the other *cestui qui trust*, a right to say, had my share of the moneys been paid over to me as received by *Helliwell*, I could have employed them in my business at seven per cent.; and may not they all say, though *Helliwell* was not in trade, yet that he used these moneys as his own, paying them into his private banking account, and thus supplying himself with money which he could not have obtained anywhere under seven per cent. Looking at the state of the money market in this country from 1854 to the present time, what would be a fair rate of interest, with which to charge *Helliwell* on the balances in his hands? While seven per cent has been since 1858, the legal bank rate, we know that by deducting the interest in the first instance, the bank is enabled to make more than that sum, and that the borrower thus pays more as he is at the loss in the mean time of so much money as makes the discount. *Helliwell* cannot ask a very critical inquiry on this head, for he has caused the injury to those for whom he was appointed to act, and has himself improperly had the use of money which belonged to them. Compound interest may in some instances, in such a case as the present, be a convenient mode of making this compensation, as in *Small v. Eccles*, (in which however, as I understand, the defaulting trustee was, as to the matters in question, a trader,) but in other cases, it may be oppressive, and sound more as punishment than compensation. Without saying what in the future, according to the value of money, or the amount of interest payable on investments, may be a fair rate to charge on moneys improperly withheld or used by a trustee, I think in the present case I shall be dealing fairly by all parties in directing that *Helliwell* be charged with eight per cent in lieu of compound interest, which would largely exceed that rate in the aggregate, as appears from a memorandum furnished me by

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Helliwell.

1867. the Accountant. I may add here, that while the Court will give parties entitled to trust moneys such compensation from the trustee as the Court, without respect to any speculative advantages that might have been claimed from the use of the moneys, thinks a fair equivalent, the parties interested and seeking more than this, should themselves pay attention to the management of the trust, and come promptly to the Court to complain, and thus prevent further loss, or abuse of the trust. *Helliwell* also complains that he should have been allowed for his expenditure in improvements on the trust property. With regard to this, so far as the judgment creditors are concerned, I am told it is not important to dispose of the question, as, after paying them, there will be a surplus of the estate; but I think that as against the settlor's estate all such expenditure made in the life time of the settlor, and with his permission, should be allowed; and all expenditure judiciously made, though not with his sanction, for the purpose of adding to the value of the estate, so as to promote its sale, which was the object of the trust, should also be allowed. I think the Master should give credence and effect to the affidavit of the executor, in which he deposes to the moneys expended by *Helliwell* and the settlor. The latter seems to have lived on the property and conducted the sales of it from time to time, as *Helliwell's* agent, and he was the party most interested in turning the property to the best account, as there was a resulting trust in his favour.

Judgment.

*Helliwell* claims to be allowed or to be discharged from a sum of £17, or thereabouts, refunded to a purchaser, one *A. Bolton*. No evidence in support of this pretension has been furnished to me, and I therefore reject it.

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1867.

## STEWART V. KINGSMILL.

*Injunction against plaintiff.*

An injunction may be granted against a plaintiff at the instance of defendant before decree.

This was a suit by mortgagees to foreclose their mortgage security, and the defendants presented a petition before decree seeking to stay proceedings at law, by the plaintiff, in respect of portions of the mortgaged premises, which had been sold by the mortgagor to various persons, it being insisted that by an agreement with he plaintiffs they were bound to confirm the sales.

Several objections were made to the application, and being an application before decree,

SPRAGGE, V. C.—After taking time to consider, Judgment.  
granted the application referring to *Edgecombe v. Carpenter* (a), as an authority for granting defendants an injunction before decree.

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THE CORPORATION OF THE UNITED COUNTIES OF MARA  
AND RAMA V. THE CORPORATION OF THE COUNTY OF  
ONTARIO.

*Municipal Council.*

Sums were credited by the Treasurer of a County in the Corporation books to certain Townships, in respect of the non-resident land fund. Portions thereof were paid over to the Townships and other sums were in the same books charged against one of the Townships which the Township considered itself not chargeable with. The Treasurer's books, containing these entries, were audited and approved by the County Council, but no by-law had been passed by the County Council appropriating the fund:

*Held*, that the Townships had no relief in equity.

The bill in this cause was filed by *The Corporation* Statement.

1867. *of the United Townships of Mara and Rama, setting forth—*

Corporation  
of Mara, &c.

v.

Corporation  
of Ontario.

Statement.

1. That from and since the month of January, 1854, the defendant *William Paxton*, the younger, had been the Treasurer of the defendants *The Corporation of the County of Ontario*, duly appointed as such Treasurer, entitled to receive and keep all moneys belonging to the said Corporation of the County of Ontario, and to pay the same out to such persons, and in such manner, as the laws of the Province and the lawful By-Laws or resolutions of the said the Corporation of the County of Ontario should direct, and also to keep books in which he should enter under the heading of every local municipality in the said County, all the lands in the municipality on which it appeared from the returns made to him by the clerk of such municipality, and from the collector's roll returned to him that there were taxes unpaid and the amount so due, and on the first day of May in every year complete, and balance his books by entering against every parcel of land the arrears, if any, due at the last settlement and the taxes of the preceding year which remain unpaid, and ascertain and enter therein the total amount of arrears, if any, chargeable upon the land at that date ; and also to receive payment of all such arrears of taxes, and of all the taxes on lands of non-residents in such municipality ; and whenever he the said Treasurer was satisfied that there was a distress upon any lands of non-residents in such municipality in arrears for taxes, to issue a warrant under his hand and seal to the Sheriff of the said County therefor, and whenever any portion of the tax on any land in such municipality had been due for five years, or for such longer period, and of such amount as a By-Law of the Council of the said County prescribes, to issue a warrant under his hand and seal directed to a Sheriff of the said County commanding him to levy upon the land for the arrears due thereon, with his costs, and to open an

account for each local municipality in the said County, 1867.  
with a fund made up of all the moneys received by the  
said Treasurer on account of the said taxes and non-  
resident land, whether paid to him directly or levied by  
the said Sheriff, and called the non-resident land fund  
of the said County.

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of Mara, &c.  
v.  
Corporation  
of Ontario.

2. That the United Townships of Mara and Rama  
were a local municipality in the said County of Ontario.

3. That the defendant *William Paxton*, the younger  
as such Treasurer as aforesaid, had been paid, and re-  
ceived at various times from and since the month of  
January, 1854, large sums of money in payment of  
arrears of taxes due upon lands in the municipality of  
the United Townships of Mara and Rama, in the said  
County, and for taxes on lands of non-residents therein,  
and for which said moneys the said Treasurer should  
have opened an account for the plaintiffs with the non-  
resident land fund of the said County, and the same  
should have been entered and appear therein to the  
credit of the plaintiffs.

Statement.

4. That the defendant *William Paxton*, the younger,  
had not kept correct accounts of his dealings and trans-  
actions in respect of the said moneys so paid to and  
received by him as aforesaid, and particularly the said  
*William Paxton*, the younger, as such Treasurer, had  
debited plaintiffs in an account which as such Treas-  
urer he has opened for them with the said non-resident  
land fund of the said County, with sums of money which  
had never been paid to them or for their use, and which  
of right he ought not to have debited them with in  
the said account.

5. The defendant *William Paxton*, the younger, as  
such Treasurer as aforesaid, refused to render any state-  
ment of his dealings with the said moneys although

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of Ontario.

1867. repeatedly applied to for such statement and to account, and had refused to pay any attention to, or to take any notice of the applications so made to him. The plaintiffs therefore had been unable to ascertain the state of the said accounts between them and the said non-resident land fund, but they charged that there was a large sum of money in the hands of the defendant *William Paxton*, the younger, as such Treasurer as aforesaid, and which should appear to the credit of the plaintiffs in the said account, and that it would so appear if the defendant *William Paxton*, the younger, would set forth as he ought to do, a full, true and particular account of all the moneys received by him as such Treasurer as aforesaid, on account of the taxes and non-resident lands in the said United Townships of Mara and Rama, with the times when, persons from whom, and the lands on which the same were received, and how such moneys were applied, and the portions thereof which had, from time to time, been paid out by him as such Treasurer, with the names of the persons to whom, and the authority upon which the same were so paid, and what the balance of such moneys in his hands as such Treasurer as aforesaid was, and what arrears of taxes on non-resident lands in the said United Townships of Mara and Rama in arrear remained, with the several amounts thereof, and also the several dates and the lands on which the same were payable.

Statement.

6. That the said moneys so paid to the said *William Paxton*, the younger, as such Treasurer as aforesaid, were subject to the control of the defendants the Corporation of the County of Ontario, and the said Corporation of the County of Ontario were responsible and accountable to the plaintiffs for the same, and for the due and proper application thereof by the said defendant *William Paxton*, the younger.

7. That the defendants the Corporation of the County

of Ontario ought to pass a By-Law of the said Corporation apportioning to plaintiffs the surplus moneys in the said non-resident land fund to the credit of plaintiffs in the said account opened for them with the said fund as aforesaid, when and so soon as the said accounts should have been taken and such surplus had been fully disclosed and ascertained, and the same should then be paid over to the plaintiffs; and prayed—

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of Mara, &c.  
v.  
Corporation  
of Ontario.

“1. That an account may be taken of all the moneys received by the said defendant *William Paxton*, the younger, as such Treasurer as aforesaid, on account of the taxes on non-resident lands in the said United Townships of Mara and Rama, with the times when, persons from whom, and the lands on which the same were received, and how such moneys were applied, and the portions thereof which have, from time to time, been paid out by the said defendant *William Paxton*, the younger, as such Treasurer as aforesaid, with the names of the persons to whom, and the authority upon which the same were so paid, and the balance of said money now in his hands as such Treasurer as aforesaid, and the arrears of taxes on non-resident lands in the said United Townships of Mara and Rama remaining unpaid to the said defendant *William Paxton*, the younger, as such Treasurer as aforesaid, with the several amounts thereof, and also the several dates and the lands on which the same were payable.

Statement.

“2. That the surplus moneys or balance in the said non-resident land fund to the credit of plaintiffs in the said account opened for plaintiffs with the said fund as aforesaid, and which upon the accounts aforesaid shall appear to the credit of plaintiffs, may be paid to plaintiffs.

“3. That plaintiffs may be paid the costs of this suit.

1867. "4. That for the purpose aforesaid all proper directions may be given and accounts taken, and that plaintiffs may have such other and further relief as may seem meet."

Corporation  
of Mara, &c.  
v  
Corporation  
of Ontario.

The defendants the County, answered the bill, contesting the right of plaintiffs to call upon them to pay over the money demanded by plaintiffs, or to pass the By-Law suggested by the bill; or that such By-Law was necessary, or that it was incumbent on the County to pass the same; that moneys had been paid over to the Reeve of the Townships of Mara and Rama, and not to the Treasurer of the Townships, and on that ground the plaintiffs endeavoured to repudiate such payments.

The cause came on for the examination of witnesses and hearing before the Chancellor, at the sittings in Whitby.

Mr. *Roaf*, Q. C., and Mr. *R. J. Wilson*, for the plaintiffs.

Mr. *Fitzgerald*, for the defendants the County of Ontario.

Mr. *Blake*, Q.C., and Mr. *Cochrane*, for the defendant *Paxton*.

VANKOUGHNET, C.—I must say that I do not see any equity made out in this case.

I do not think the plaintiffs' bill so framed as to enable them to make out a case by shewing any improper specific transactions by the Treasurer of the Counties, for which the County is to be made responsible, such as the refunding to purchasers money paid for lands sold by the Sheriff for taxes where no taxes were payable, and then charging these sums over to the Township plaintiffs. Three or four cases of this kind

are adduced in evidence, but they are not made the subject of charges in the bill: nor is any case presented in respect of any such alleged misconduct.

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 of Mara, &c.  
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 Corporation  
 of Ontario.

The whole scope of the bill is general, to obtain an account, and recover moneys withheld by the County from the Township plaintiffs. It is alleged that the plaintiffs cannot get an account except through the machinery of this Court; and that the ascertaining and settling it is of such a complicated character as to render it difficult to proceed at law, and to confer therefore jurisdiction on this Court, or render it proper for this Court to interfere. I do not see this. With the exception of the three or four specific cases spoken of, in which it is alleged the Treasurer repaid money to purchasers of lands sold for taxes and deducted their amounts from the moneys coming to the Townships, I see nothing peculiar in the case or differing from other cases in which Townships may be entitled to a rateable share of moneys collected and paid into the County Treasury. The claim of the plaintiffs is to moneys arising from the non-resident land tax. These moneys are not payable over by the County to any of the Townships until a By-law properly apportioning them has been passed by the County Council in its discretion; and this discretion may be exercised according to circumstances. The plaintiffs admit that no such By-law has been passed in this case, and that the power to pass it is discretionary in the Council. They do not present or make any case to shew that the Council of the County has fraudulently or improperly withheld this By-Law. But they say the County Treasurer and the Council by their audit and approval of his accounts have sanctioned the payment over to the Townships of the moneys which, according to the entries in his books, would be rateably and properly payable over, and have so committed themselves to such payment; and they say, that in the case of these particular Townships,

1867. the defendants, through their Treasurer, did actually attempt to pay over to the Townships the amounts which the Treasurer's books shew were payable to them (less these three or four specific sums of refunds on sales), by their Treasurer delivering the money to the Reeve of the Townships, who was never authorized by the Townships nor their Treasurer to receive it, and who never in fact paid over or accounted for the whole of the moneys so received by him; and that for any loss thus arising to the Townships, the County is liable.

Corporation  
of Mara, &c.  
v.  
Corporation  
of Ontario.

Judgment.

Now the first difficulty that strikes one as in the plaintiffs' way is, how can they call upon the County for payment of moneys which have not yet legally become theirs by any appropriation by By-law of the Council? If the Treasurer or the County has sent the Township certain moneys, portions of which they have received, let the Townships be thankful for those, and credit them; but the sending by the County, or the receipt by the Township, of these does not create in the County the liability to pay any more, or give to the Townships the right to call the County to account for moneys which the County were never bound to pay over to them, though they sent them or part of them in advance of that liability.

I do not see how this Court can strike a rate, or force the County to admit the amount due to these particular Townships, in the absence of the other Townships.

The Legislature have entrusted the Municipal Council—the County Parliament—with the duty of ascertaining and fixing this amount: that is, of apportioning the surplus moneys of the non-resident land fund among the Townships: this Council being composed of the Reeves of all the Townships interested. The Council has the discretionary power, therefore, of naming by By-law when the money is to be paid over; and it cannot be paid over till by By-law it is apportioned.

It seems to me that the remedy, if any, to compel the passing of any such By-law is at law; that the remedy to obtain the money payable under it is at law; that the question of whether the charges made against the Townships on account, are or are not such as they are obliged to submit to, is at law; that the question whether the money for the Townships was or not handed to their duly authorized agent is at law; that there is no complication or difficulty which exists in the way of an adjudication there; that the books and proceedings of the County Council and officials can be procured there as well as here; and that, therefore, the plaintiffs make out no case for relief by this tribunal.

1867.  
Corporation  
of Mara, &c.  
v.  
Corporation  
of Ontario.

I dismiss the bill with costs.

# THE GREAT WESTERN RAILWAY COMPANY V. JONES.

*Vendor and Purchaser—Interest—Practice—Costs against executors.*

Where a purchaser takes possession before conveyance, he is liable to interest from the time of taking possession, and the liability is not limited to a period of six years.

To save interest by an appropriation of the purchase money, the money should be separated from the purchaser's general bank account, and notice of the appropriation must be given to the vendor.

In litigating with third persons, executors are, with respect to costs, in the same position as parties who litigate in their own right.

This case had been heard before Vice-Chancellor Mowat, at Hamilton, and in drawing up the decree on the judgment afterwards pronounced, some questions arose between the Solicitors, which were spoken to by consent.

Statement.

It appeared from the bill that the plaintiffs had contracted with the principal officers of Her Majesty's Ordnance for the purchase, for £700 sterling, of some

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Western R.  
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Jones.

1867. land on Burlington Heights as a track for the Railway. Before the money was paid or a conveyance executed, the Company took possession and made use of the land for the purpose intended, and had been in possession ever since. On the 4th of June, 1860, part of this land was, with land adjoining, granted to Sir *Allan N. McNab*, who mortgaged to the defendant *Edward Jones* on the 6th of August, 1862, having first made a will devising the land to the defendant *Sophia McNab*, who was also his personal representative. On the 14th of September, 1863, *Jones* commenced an action of ejectment against the Company, and the present suit was instituted to restrain the action and for other relief. The defendants were Mr. *Jones*, Mrs. *McNab*, Her Majesty's Principal Secretary of State for the War Department, and The Attorney-General for Upper Canada. The Vice-Chancellor held that the plaintiffs were entitled to a conveyance of the property on payment of the consideration money, £700 sterling, with interest, and that

Statement. *Jones* was entitled to no part of that sum; but was unable, on that occasion, except by consent, to decide whether the Provincial Government or the Ordnance Department was entitled to the money, this involving questions of fact between co-defendants in which the plaintiffs were not concerned. The money was therefore ordered to be paid into Court, with liberty to the Attorney-General and the Secretary of War, respectively, to apply as they might be advised; and the costs of all parties were directed to be paid by *Jones* and Mrs. *McNab*.

The questions argued on the minutes were, as to the Company's liability for interest, and Mrs. *McNab's* liability to costs.

Mr. *Roaf*, Q. C., for the plaintiffs.

Mr. *Blake*, Q. C., for the defendant *Jones*.

Mr. Crooks, Q. C., for *The Attorney-General*.

1867.

Mr. Gwynne, Q. C., for Mrs. McNab.

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Western R.  
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v.  
Jones.

MOWAT, V. C.—*Primâ facie* where a purchaser takes possession he is liable to pay interest from the time of taking possession; and *Toft v. Stephenson* (a) is an express authority that the liability is not limited to a period of six years, even as between subject and subject.

But it is said that there was an appropriation by the Company of money to meet the sum they were to pay, and that notice of this appropriation was given to the War Department by letter of the 2nd of August, 1860. There is no evidence of this appropriation; but the Company offers, if now permitted, to prove that the balance at their banker's ever since that date exceeded £700 sterling, the amount of the purchase money. The letter referred to states that the Company had appropriated this sum for that purpose, under the expectation that the money would at some time be required from them; and a hope is expressed that, under the circumstances stated in the letter, interest would not be required. Judgment.

Now, more than £700 sterling was payable at the date of this letter, namely, the interest which had then accrued; and appropriation of part of what is due for purchase money is not sufficient to save future interest. Then there was, confessedly, no appropriation in the proper sense of the term; and the mere fact that the Company's balance in Bank has ever since exceeded £700 sterling, would not, I think, have been sufficient, even if that sum was all that was then payable. *Winter v. Blades* before Sir John Leach (b), which was relied on for the Company, is supported by no other authority before or since that I am aware of, and is disapproved

(a) 7 Hare 1.

(b) 2 S. & S. 393.

1867.

The Great  
Western R.  
W. Co.  
v.  
Jones.

Judgment.

of by Lord *St. Leonards* (a). In that case the purchase money was £14,000, and it was proved that immediately on entering into the contract the purchaser had called in a sum of money, secured by a mortgage, amounting to £12,400; and upon entering into possession of the estate, gave notice to the vendor that he was ready to invest the purchase money as the vendor should direct, pending the investigation of the title. That letter was not answered. The balance to the purchaser's credit at his banker's was, for the nine months the investigation lasted, never less than £14,000, except for four days that it was some £200 less. The Vice-Chancellor's judgment under these circumstances, was as follows: "If, after the notice given by the defendant, he had no profit of the purchase money, then it would not be reasonable that he should be charged with the interest. But that he has made some profit of the money appears upon the defendant's own evidence; first, because his balance at his banker's was, in a small degree, and for a few days, reduced below the amount of the purchase money; but, principally, because the purchase money supplied the place of that balance which he must otherwise have maintained at his banker's. Let the Master inquire what was the average balance which the defendant maintained at his banker's during the three years preceding the purchase, computing such balances at the end of every month; and let the Master also enquire what was the average balance which, during the time in question, the defendant maintained at his banker's, computing such balance monthly; and let the Master deduct what he shall find to have been the defendant's average balance for the three years from what he shall find to have been the defendant's average balance during the time in question; and declare that, to the amount of the difference, the defendant is not chargeable with interest on his purchase money."

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(a) Sug. V. & P. ch. 17, sec. 1, pl. 3, p. 628, 14th ed.

It might not unreasonably be presumed, perhaps, that 1867.  
if a private gentleman kept £14,000 more at his  
banker's for the period alleged than he had done for  
three years before, this was in order to be ready to pay  
his purchase money. It was not stated that there was  
a difference of £700 sterling in the Bank balances of  
this Company before and after the date referred to ; but  
if there was, that difference in the case of a great Railway  
Company would lead to no such inference as the Vice-  
Chancellor drew in the case cited. It was not suggested,  
indeed, that the Company had kept £700 more at their  
credit than they otherwise would have done, in order to  
meet this liability ; and I have no doubt they have not  
done so.

The Great  
Western R.  
W. Co.  
v.  
Jones.

I think interest must be paid from the time of taking  
possession.

It was argued that Mrs. *McNab* should not be ordered,  
jointly with Mr. *Jones*, to pay the costs, or at all events Judgment  
that the payment should be confined to personal assets  
in her hands. It is quite clear that if Sir *Allan McNab*  
had been the defendant, the decree should be with costs  
against him ; and the settled rule is, that, in litigations  
with third persons, executors are liable personally to pay  
costs, whatever the state of the assets may be (*a*). Had  
Mrs. *McNab* taken the trouble to ascertain the facts  
before putting in her answer, and thereupon submitted  
to the relief prayed, instead of putting the plaintiffs to the  
proof of their case, so far as she was concerned ; and had she  
at the same time set up in her answer that she had no assets  
of the deceased—the question would have been open to  
different considerations. It was said, though not proved,  
that a suit is pending for the administration of Sir *Allan*  
*McNab*'s estate, and that the defendant had paid into  
Court in that suit the money in her hands. If this

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(*a*) See cases collected Morgan & Davey on Costs 288.

1867. is so, she may in that suit be allowed these costs on establishing a proper case for them; but with that I have nothing now to do. I do not feel at liberty to vary this part of the judgment which I pronounced after the hearing at Hamilton.

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### CARTWRIGHT V. DIEHL.

#### *Joint tenants—Partition—Costs.*

In suits between joint owners for partition or sale, the costs are to be borne by the parties in proportion to their respective interests in the property; except that in the case of partition the Court, if it sees fit, may give no costs to either party up to the hearing.

This was a partition suit, and came on by way of motion for decree.

Mr. Moss for the plaintiff and defendants other than *Diehl* and *Straubenzie*.

Mr. *VanKoughnet* for the defendants *Diehl* and *Straubenzie*.

Judgment. MOWAT, V. C.—This is a suit by some of the joint owners of real estate against others of them for a partition or sale. On the hearing it was admitted by all parties that a partition would be inconvenient and a sale preferable. The only question was with respect to the costs, as to which the practice in this country appears not to have been uniform.

In England, the general rule in suits for partition, is to give no costs to any party up to the hearing, and to direct the subsequent costs to be borne by the parties in proportion to the value of their interests (*a*).

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(a) See forms 1 Seton on Dec. p. 581 and 582, 3rd ed.

Our Statute (a) respecting the partition and sale of real estate directs (b) that "the Court shall apportion the costs of the proceedings on the petition according to the respective shares and interests of the parties, known or unknown." This enactment has always been construed, I believe, as including the costs of the petition itself.

1867.  
Cartwright  
v.  
Diehl.

The result is that in unopposed cases, parties must clearly bear the costs subsequent to the hearing in proportion to their respective interests, or (which means the same thing) to the value of their respective interests.

With reference to the costs prior to the hearing, the Court might, I presume, either follow the old rule of the Court and give no costs, or take the statutory rule and apportion these in the same way as the subsequent costs, and I think the latter the preferable course.

In the present case, the decree will be accordingly.

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MAHON v. McLEAN.

*Grant from the Crown.*

Although parties dealing with the Crown will be held to the strictest good faith, yet, where it was shewn that the patentee of land was ignorant of a fact which might have been material to bring under the notice of the officers of the Crown, and the plaintiff had the opportunity but failed to do so, and subsequently filed a bill impeaching the patent as having been issued in error and improvidence, the Court refused the relief prayed, and dismissed the bill with costs.

The bill was filed to have declared void a patent of certain land issued in the name of the defendant, or

Statement.

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(a) U. C. Consol. Stats. ch. 86.

(b) Sec. 36.

1867. that the defendant holding thereunder was a trustee for the plaintiff.

Mahon  
v.  
McLean.

The cause came on for the examination of witnesses and hearing before the Chancellor at Guelph.

Mr. *Roaf*, Q. C., and Mr. *Patterson* (of Guelph), for the plaintiff.

Mr. *Crooks*, Q. C., and Mr. *Kingsmill*, for the defendant.

Judgment. VANKOUGHNET, C.—The bill, though it alleges that the patent issued in error and improvidently, yet proceeds upon the fraud practised by the defendant *McLean* as the cause of that error and improvidence. There is no evidence of any fraud by *McLean*, who does not appear to have been at all aware of the main circumstance which the bill alleges was concealed from the Commissioner of Crown Lands, namely, the measurement of land for the mill pond in 1862, by the plaintiff and the executors of *Schutz* in concert. It does not appear, certainly, that the Commissioner was made aware of this, and had it appeared that *McLean* concealed it, or that the plaintiff had had no opportunity of making it known to the Department, it might have perhaps been proper to place the matter again in the hands of the Department for reconsideration, although it is not probable in my judgment that a different decision would be arrived at. But it seems to me that *McLean* being innocent of any deception and the plaintiff being aware of his application, and that of the executors of *Schutz* for a part of the land under the agreement between *Schutz* and the plaintiff nearly twenty years previously, (if he was not actually aware of the precise quantity and description of the piece of the land referred to, which his reference to the petition would seem to shew he had knowledge or notice of) the plaintiff was bound to have brought under

1867.

Mahon  
v.  
McLean.

the consideration of the Commissioner the fact he now relies upon. His contention, now put forward is, that in 1862 the quantity of land which he was to convey under the agreement was ascertained between him and the executors in 1862, and was described on a map or plan made by the surveyor who acted in the matter. Instead of this, the plaintiff resists the application of the executors and of *McLean* claiming under them, on the ground that they or he are or was not entitled to anything. The map referred to remained in his own possession, and the executors or *McLean* do not appear ever to have had a copy of it. The plaintiff does not bring it under the notice of the Commissioner, but, failing on a mere contention, or pretence before him, makes it the main material on which he builds his case to rescind the patent now issued. While I shall always, when I have the opportunity, hold parties dealing with the Crown, to the strictest good faith, yet, in a case like the present, where the patentee was ignorant and the complainant had knowledge of a fact which it may have been material for the Crown or its officer to know, and the latter has the opportunity, but failed to bring it under notice, he at least cannot complain. It is not quite clear on what view the measurement indicated by the plan was had. It may have been as stated by *Black*, one of the executors, to ascertain the portion merely of the pond for which the executors were to pay. *Black* whose assent would have been necessary, says that he did not concur in it for any other purpose. The plaintiff was not entitled to much consideration from the Crown. Purchasing the land at a certain price in 1832, on condition of erecting a mill, he was absolved from the latter condition on the pretence by him that there was not sufficient water power, and that the mill was not required in the neighbourhood; whereas, it appears to have been a great want. Having paid nothing but a trifle, he sells in 1845 the mill site to *Schutz*, with land for a dam and head of water, and

Judgment.

1867. never obtains a patent; and when *Schutz's* assignee, nearly twenty years later, seeks for a patent for the sold portion, he denies the right altogether. I must not forget to add that I think those claiming under *Schutz* did not by anything that occurred, forfeit their right to enough land to enable them to procure a ten feet head of water, and that upon the evidence, the plan furnished to the Department did not designate too much land for that purpose. Bill dismissed with costs.

Mahon  
v.  
McLean.

### ALLAN V. NEWMAN. .

#### *Laches—Injunction.*

Mere delay of a party to enforce his claim at law furnishes no ground for this Court interfering with his legal right, although it might be a good answer were he seeking specific performance of the contract here.

**Statement.** This was a suit to set aside a judgment obtained by the defendant, and for an injunction to restrain proceedings at law to recover the amount of certain promissory notes given by plaintiff in part payment of purchase money for premises sold him, he having parted with his interest in the contract for sale, and setting up that he did so with the concurrence of defendant, who accepted the assignees to whom the interest passed as purchasers in the plaintiff's stead.

The cause came on for the examination of witnesses and hearing before the Chancellor at Guelph.

Mr. *Snelling* for the plaintiff.

Mr. *Drew* for the defendant.

**Judgment.** VANKOUGHNET, C.—A consideration of the evidence, I think, shews merely this, that both parties have

1867.

Allan  
v.  
Newman.

neglected to act upon the contract beyond the suit at law upon the promissory note given by *Allan* for part of the purchase money. But I find no act of the vendor or his assignee by which he released *Allan* from his legal liability as vendee, or disabled himself from fulfilling the contract so soon as the purchase money is paid. It may be that neither party expected that the contract would be fulfilled and the vendor may have abandoned all hope of being paid, and thought the contract of little value, and has acted accordingly. But he has never expressly abandoned it. He has done no act inconsistent with its existence or fulfilment, and mere laches is not enough to deprive him of his legal right. Laches might be a very good answer were he seeking specific performance here, but it furnishes no ground for interfering with his legal remedy. This Court will often refuse to help a vendor who has not been vigilant, but they will leave him at the same time his legal rights. If *Allan* comes forward now and pays the purchase money, I see nothing to prevent the contract being fulfilled. His neglect or abandonment can be no answer to the vendor's legal right, and I am not aware of any authority which says that the mere neglect or delay of the one party or the other, gives this Court a right to interfere with the legal remedy. I therefore dismiss the bill with costs.

Statement.

This case was re-heard before the full Court at the instance of the plaintiff.

*Mr. Fitzgerald* and *Mr. Snelling* for the plaintiff.

*Mr. Drew* for the defendant.

The judgment of the Court was delivered by

VANKOUGHNET, C.—We are of opinion that there was not any novation of the contract, and that the claim to relief on that ground fails.

Judgment

1867.

Allan  
 v.  
 Newman.

Judgment.

We think the judgment should be affirmed. Independently of the reasons given in my judgment on the hearing, it really does not appear that the vendor or his assignee was guilty of any laches in enforcing the contract. *Allan* left the country in April, 1849, and did not return till 1864. *Spencer*, the last assignee, ran away about the same time. There was no one against whom the contract could be enforced. *Newman*, the assignee of the vendor, expressly reserved to himself the legal estate in the land sold to *Allan*, and was therefore always in a position to convey; he having sold to *McCowan & Scragge* his right to *Allan's* purchase money, and that was merely a balance after deducting the amount represented by the judgment which the defendant, *McCowan*, claims. The vendor or his assignee never put an end to the contract. The assignee of the balance of the purchase money did; but we cannot say that there was such a determination or destruction or abandonment of the contract as to deprive the assignee of the purchase money, represented by the judgment, of his legal right to enforce it. But the bill does not make any case on the ground of laches or abandonment.

*Per Curiam*—Decree affirmed with costs.

### WALKER V. ALLEY.

*Injunction—Trade sign.*

The plaintiff carried on business in the City of L., having for his sign a figure of a gilt lion, and designating his place of business "The Golden Lion." The defendant for some years had had the conduct of this business, and having determined on commencing on his own account the same line of business, opened a shop, in front of which he placed a figure somewhat similar to that used by the plaintiff: the Court on the application of the plaintiff restrained the defendant from using as a sign this or any similar figure.

Statement.

This was a motion for an injunction to restrain the

defendant from continuing to use as a sign for designating his place of business the figure of a gilt lion, on the grounds stated in the head note and judgment.

1867.

Walker  
v  
Alley.

Mr. *Fitzgerald*, in support of the application.

Mr. *Blake*, Q. C., contra.

VANKOUGHNET, C.—I might have felt difficulty in granting an injunction against a party using the sign of “The Golden Lion” who did not stand in the position of the defendant in relation to the past and present business of the plaintiff. The defendant was for several years, and up to within four months, the manager in London of the plaintiff’s business carried on there in a store well known by the sign of “The Golden Lion.” It is not denied that the store was known by this sign and designation—the only one of the kind in the town. The defendant while thus in the plaintiff’s employ was looked upon by many of the customers as one of the partners, and frequently addressed as Mr. *Walker*. Determining to commence business for himself, the defendant issued an advertisement announcing this to the public, and, I think, unfairly and disingenuously, in the same notice, returning them his thanks for past favors, as though he had been interested in the business, which, for many years it was his duty to carry on, protect and improve, as much as possible, for the plaintiff. All men of business are more or less subject to the loss of customers which follows upon a clerk or manager leaving them and opening a similar business to theirs on his own account. With the managing clerk, customers become more familiar than with the owner of the business—contract often friendships with him;—and from these causes, and from that common feeling which prompts one to desire the success of a man starting in business for himself, will follow him to the new establishment and become in time his customers. All this men

Judgment.

1867. in business must submit to, and the loss to them thereby is often very great. It is hard enough, however, to have to yield up from this cause so much of their business; and they ought not to be compelled to suffer from any unfair means used by the clerk, who has left them, to attract it away. Competition in trade is to be encouraged, but fair dealing must also be observed.

Walker  
v.  
Alley.

Judgment.

Now, I cannot help feeling that the defendant thought and believed that the sign or figure of the lion would attract plaintiff's customers to his new store. If he did so believe, and so believing did use the figure for that purpose, then I think the plaintiff's equity is made out. In *Eddleston v. Eddleston*, 9 Jurist N. S. at page 480, the Lord Chancellor says "This Court will act on the principle of protecting property alone, and it is not necessary, for an injunction, to prove fraud on the defendant, or that the credit of the plaintiff is injured by the sale of an inferior article. The injury done to the plaintiff in his trade by the loss of custom is sufficient to support his title to relief. Neither will the plaintiff be deprived of relief in equity, even if it is shewn by the defendants that all the persons who bought from them goods bearing the plaintiff's trade marks were well aware that the goods were not of the plaintiff's manufacture. If the goods were so supplied by the defendants for the purpose of being sold again in the market, the injury to the plaintiff is sufficient. Again it is not necessary for relief in equity that proof should be given of persons having been actually deceived, and having bought goods with the defendant's mark under the belief that they were of the manufacture of the plaintiff, provided that the Court be satisfied that the resemblance is such as would be likely to cause the one mark to be mistaken for the other." Some difficulty may be created by the use of the word "property" in trade marks. It may be said, what is property unless it be something tangible? I take property, when used

in this connection and sense, to be a means, by which money or money's worth in the shape of profit or otherwise is created or obtained. Mr. *Blake* argues that the doctrine of the Court, in securing the exclusive use of trade marks to a party who has first applied and appropriated them to some particular description of goods or manufacture, has never in England been extended to a case like the present—the use of an outside sign or figure to designate a particular store or place of business. But there is no reason why the doctrine should not be so extended. The principle on which it rests warrants such extension; and the enormous increase of trade and the varieties in trade—the expansion of old, and the creation of new classes of business hourly call for the application of the principles of equity to fresh subjects. I entirely concur in the language, reasoning and decision in the American case of *Howard v. Henriques* reported in the 3rd volume of *Sandford's* New York Supreme Court Cases, at page 725. There was an hotel in the city of New York well known as the “Irving House,” often called the “Irving Hotel;” The defendant styled a house of entertainment opened by him “The Irving Hotel;” issued cards and posters advertising his place by that name; runners for his house used it, and attracted visitors by it. The reputation of the original Irving House was great. Its name was known widely throughout the country. Strangers visiting New York wished to go to the Irving House or Hotel, and were deceived into going to defendant's house by the name he used. The Court held that this was an unjust interference with the rights and business of the plaintiffs. Now, in this case, it appears to me that the defendant considered that the sign of the “Golden Lion” would be of advantage to him; and why? not because in itself, a golden lion would be more attractive than a golden elephant, or a gilt figure of any other large beast of the forest, but because, as it seems to me, the defendant thought and, from his persistence in main-

1867.

Walker  
v.  
Alley.

Judgment.

1867.

Walker  
v.  
Alley.

taining it, thinks still, that this sign well known as that of the plaintiffs, would attract to him business which would have gone to the other lion, had he been left alone in his glory. If this be so, the defendant has brought on his own condemnation; while, on the principles enunciated in the decided cases, it is not necessary to shew that the defendant designedly used the plaintiff's trade mark, knowing it to be his; and, while in such a case, it is very often difficult to decide what is such a distinctive trade mark as to give a plaintiff an exclusive right to it, as I might have found it here, was it not for the defendant's own conduct, yet, when it is clear to the Court that the defendant himself intended an advantage by the use of a particular sign or mark, in use by another, and believes he has obtained it; or, in other words, that the defendant himself thought the use of it was calculated to advertize him at the expense of the plaintiff, and this was his object in using it, and where such has been the effect of the user, I think the Court should say to him "remove that sign—its use by you may, as you intend, damage the plaintiff. It cannot be necessary or valuable to you for any other purpose. You have your choice of many signs, which, as a mere attraction or to give your store a marked designation, must answer a fair business purpose equally well."

Judgment.

I have not lost sight of the facts, that the defendant's store is not on the same side of the street with the plaintiffs—that there are marked differences in the exterior appearances of the buildings; that the defendant's lion reposes on a verandah, while the plaintiff's sits over a door; and that the plaintiff sells ready-made clothing and the defendant does not; both, however, carrying on what is called a general dry goods business. But notwithstanding all this, I think that in the defendant's own judgment, his lion was calculated to deceive strangers who would not or did not know which was the true sign

of the lion—or the old lion—until they had entered one or other of the shops; and might not even know then. Those more familiar with the plaintiff's plan of business might not be so misled; but even they, unless on close inspection, would not discover much if any difference between the two figures, although Mr. *Blake* contends that this is very noticeable in the photographs of them produced. I confess the differences do not appear to me likely to attract notice under the rapid look which one would give in seeking for the sign of "The Golden Lion." Both figures are as lions couchant. Both are very like in shape and size, though defendant's is somewhat larger than plaintiff's. The most marked difference is in the expression and look of the faces. The plaintiff's lion looks older than the defendant's—has a more sedate, a somewhat sorrowful expression, and seems more resigned to his position.

1867.

Walker  
v.  
Alley.

The order will be to restrain the defendant from continuing in front of his store or place of business as the sign of, or to designate his place of business, the figure of the lion in question or any similar figure.

Judgment.

### CLARKE V. EBY.

#### *Specific performance—Parol contract.*

Lands were conveyed to W. upon the express understanding and promise that he would re-convey a certain portion thereof. *Held*, that W. was bound to re-convey.

This cause came on for the examination of witnesses and hearing before the Chancellor at the sittings of the Court at Guelph. The facts of the case are sufficiently stated in the report of the argument on demurrer, ante volume 10, page 98.

Statement.

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Mr. *Hancock*, for the plaintiffs, contended that they were clearly entitled to the relief sought, the Court when deciding the demurrer expressed a clear opinion that they were entitled to some relief. Although the contract was a parol one, the Statute of Frauds forms no bar to such relief, the contract being clearly and distinctly established. What the plaintiffs are entitled to is a release or a re-conveyance, and, if necessary, an account of the rents and profits.

Mr. *Fitzgerald* for defendants. All that is shewn by the evidence in this case, is a verbal promise by *Wright* to re-convey the portion of the property known as the orchard, and which could not be construed as amounting to a contract to do so; besides the property to be conveyed is too indefinite for the Court to act upon the contract, even if established. *Langstaff v. Playter (a)*, in this Court shews that the Court will not execute a parol contract against the words of the Statute. And here there is not any mutuality, some of the parties being infants against whom no decree for specific performance of the contract could have been obtained—referring to *Fry* on Specific Performance, page 133.

Judgment.

VANKOUGHNET, C.—I have read the report of this case when before my brother *Spragge* on demurrer, and I think the judgment then delivered by him virtually concludes the case upon the facts as found by me. I think the statements in the bill substantially established, and, acting upon the opinion expressed by my brother *Spragge* on the demurrer, that the plaintiff is entitled to relief. I think I may hold upon the evidence that *Clark* died intestate, and that I should find that the deed of the whole land would not have been made to *Wright* but upon the faith of his conveying back the portion known as the orchard, which I think is sufficiently

definite in character to enable it to be ascertained by description, on survey, as was intended by the parties. There must, however, be two inquiries—

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1st. As to whether a good title can be made to the little strip of land not covered by the mortgage, and called the gore.

2nd. Whether the contract made with *Wright* was, and is, for the benefit of the infants?

Further directions and costs reserved.

This cause was subsequently re-heard before the full Court at the instance of the defendant *Wright*, when

Argument.

Mr. *Blain* appeared for the plaintiff.

Mr. *Fitzgerald* for the defendants.

*Simpson v. Smyth* (a), *Cresy v. Beavan* (b), *Bosanquet v. Marsham* (c), *Robertson v. Londonderry* (d), *Leman v. Whithley* (e), *Jackson v. Jessup* (f), *Brassy v. Chalmers* (g), were amongst other cases, referred to.

The judgment of the Court was delivered by

VANKOUGHNET, C.—We are of opinion that the bill is proved in fact, and that the Statute of Frauds does not apply. The parties did not intend to trust to *Wright's* honor in the matter. A deed was executed to him on the understanding and faith that he was to execute a deed back of a portion of the land. This was the means by which the

Judgment.

(a) 1 U. C. E. & Ap. 1.

(b) 13 Sim. 354.

(c) 4 Sim. 573,

(d) 5 Sim. 226.

(e) 4 Russ. 426.

(f) 5 Gr. 524.

(g) 4 D. M. & G. 528.

1867. single transaction was to be accomplished. It was not intended that *Wright* should hold this portion of the land in trust for the petitioner; as when one man conveys absolute to another on the understanding, that, though absolute in form, the deed is merely in trust, and no writing is taken to evidence it: the grantor trusting and intending to trust merely to the honour of the grantee. It is more like the case of a bargain and sale, where the vendor executes a deed of the land to his vendee, who is to execute back a mortgage. The vendee takes the deed and says, "I will execute the mortgage back to-morrow," perhaps because there is no printed form of the mortgage at hand,—perhaps because there is not time to prepare it—perhaps because he is to bring in his wife to execute it, to bar her dower. He afterwards refuses to execute this mortgage, but retains the deed. Could he, when called upon, by suit, in this Court be heard to say "You took my promise to execute the mortgage, but this was not in writing. You trusted therefore to my word and to my honour, and to these the Statute of Frauds is a bar." If the Statute could not be a defence in such a case, it is not so in this, which is similar in character in that respect.

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Judgment.

I think it is too late for the defendant now to object that the contract was unilateral; that he could not enforce it against the infants; that he may never yet get a completed title. He knew what he was purchasing—the title to the mortgage premises was examined for him—he knew that the title to this or the equity of redemption was in the infants. He ran the risk of that, and if the Court now approves of the sale on their behalf, he can get all he bargained for. It does not, I think, now lie in his mouth to raise such an objection. He takes as much by the contract as he thinks for his benefit, secured, as far as he can, by deed and by suit at law, but now says "I can't be compelled to give the infants their shares of the bargain, because they could not make a contract

which I could enforce, even though the Court may enable them to carry it out." I am not aware that a fraud can be committed successfully upon an infant in a matter of contract, when it could be prevented by an adult. The plaintiff must be taken to have run the risk of the Court approving the contract, and to have acted on this. His own conduct here precludes him saying to the contrary.

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Eby.

We agree with the judgment of our brother *Spragge* on the demurrer, and think the decree should be affirmed with costs.

## STORY V. DUNLOP.

### *Executors—Costs.*

Executors are usually entitled to their costs as between Solicitor and client out of the estate; and if the executors, in addition to the costs of the suit, have incurred any other costs, charges, and expenses in the administration of the estate, on this fact being stated to the Court, but not otherwise, an inquiry will be directed and the Master will be authorized to include them in his account.

Where an executrix appealed against the Master's report and the appeal was allowed without costs:

*Held*, that she could not, on further directions, claim the costs of the appeal out of the estate.

Hearing on further directions. The Court gave the executrix her costs; and, in drawing up the minutes, two questions arose between the parties which are stated in the judgment. Statement.

Mr. *Fitzgerald* and Mr. *Cattanach* for the plaintiff.

Mr. *S. Blake* for the defendant.

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Dunlop.

MOWAT, V. C.—The rule is that executors are usually entitled to their costs as between Solicitor and client out of the estate, and if, in addition to the costs of the suit, the executors have properly incurred any other costs, charges, and expenses in the administration of the estate, on this fact being stated to the Court, an inquiry on the point is directed, and the Master is authorized to include them (a). Counsel did not in the present case suggest that any such additional costs had been incurred by the executrix, but claimed that she was entitled as of course to have the decree in this form. That does not appear to be the practice.

Judgment.

The costs of an appeal by the executrix from a former report of the Master were also asked for. The appeal was in respect of certain sums with which the Master had charged the executrix. It was heard before my brother *Spragge*, and, being successful in part, was allowed without costs; and there was no reservation of the question of costs as against the estate. In the absence of such a reservation, I find no authority warranting my making any order on the subject on further directions; and am of opinion that it is to be assumed that the learned Vice Chancellor saw no reason why the executrix should have the costs of the appeal in case she should afterwards get her general costs as between Solicitor and client or otherwise. In effect, if I made the order now asked, I would be giving costs which another Judge of co-ordinate authority had refused to give. The same result would follow if that appeal had been reheard before the three Judges, and the order in its present form had been made by them, the inconsistency of which was pointed out in the certificate presented by the sworn clerks in the Master's report in *Agobeg v.*

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(a) Seton on Decrees, p. 767, No. 4, form 3, 768, 3rd ed. 1 Smith Practice, 1083-4, 7th ed., Morgan & Davey on Costs, p. 2.

*Hartwell* (a). If an order, such as is here asked, has been made under like circumstances in any unreported case, I have no doubt this has arisen from the difficulty alluded to not having been brought to the attention of the Court. 1867.

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LIDLAW V. THE LIVERPOOL AND LONDON, &C.,  
INSURANCE CO.

*Insurance.*

When a party, on applying to effect an insurance of buildings, overstates the value of them, the policy will not thereby be avoided where it appears that such over-value was not made with a fraudulent intent.

Where a party, on applying to effect an insurance, in answer to one of the interrogatories indorsed on the printed form of application, stated that he was the owner of the estate subject to a mortgage in favor of a Building Society for \$1,500; the facts being, that he only held a contract of purchase; that a portion of the purchase money remained unpaid; and that a mortgage for the amount mentioned had been agreed for, but not executed; of which facts the Company through their agent was aware:

*Held*, that the insurance was not avoided by the inaccuracy of the statements in the application, it not being shewn that such misstatement was intentional or material.

A party on applying to insure omitted unintentionally from his description of the property some particulars which he was not asked respecting, but which had the Company's agent known, he swore he would not have insured:

*Held*, that, there being no fraudulent concealment, the omission to set forth the particulars referred to, did not render the policy void.

This cause came on for the examination of witnesses and hearing before Mr. Vice Chancellor *Mowat*, at the Spring sittings of the Court at Guelph (1867).

Statement

Mr. *Moss* and Mr. *W. N. Miller* for the plaintiff.

Mr. *Blake*, Q. C., and Mr. *Proudfoot*, contra.

1867. *Perry v. The Beacon Insurance Co. (a), Park v. The Phoenix Insurance Co. (b), Milligan v. The Equitable Insurance Co. (c), Dickson v. The Equitable Insurance Co. (d), Benham v. The United Guarantee and Life Assurance Association (e), Angell on Insurance, sections 37, 66, 147, 174.*

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Judgment.

MOWAT, V. C.—On the 9th of October, 1866, the defendant *Alexander Sutherland* effected an insurance with the other defendants on a building, then in course of erection as an hotel in the village of Petrolia, for \$2,500. The premium was paid, and the Insurance agent gave a receipt in the usual form. Before the policy was issued, viz., on the 14th of October, the building was destroyed by fire. *Sutherland* has executed an absolute assignment to the plaintiff subject to an agreement between them, not expressed in the assignment, as to the application of the money when received. But the Company object on several grounds to pay the insurance.

It was contended, that the assured, in his written application for the insurance, had over-valued the building. He stated its cash value to be \$4000, and the evidence is, that the cost was \$3,837 only,—including \$130 for materials lying on the premises to be used in completing the building, and \$325 for a verandah, the Company having, it is said, a rule never to insure verandahs, though this rule is not set forth in the form of application which was furnished by the Company, and which after being filled up was signed by the applicant, nor is it alleged that the applicant was aware of the rule. Now

(a) 7 Gr. 130.

(b) 19 U. C. Q. B. 110

(c) 16 U. C. Q. B. 314.

(d) 18 U. C. Q. B. 246.

(e) 7 Ex. 744.

opinions as to the value of property vary greatly, and where the evidence does not shew the over-valuation to have been intentional and fraudulent, it does not, generally speaking, avoid the insurance (a). I cannot say that the over-value in the present case was intentional or fraudulent.

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v.  
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The 15th interrogatory in the form of application required the applicant to "state *fully* the applicant's interest in the property, whether owner, mortgagee, lessee, &c." The applicant's answer to this was "owner." He had contracted for the purchase of the lot on the 13th of March, 1866, the lot being then vacant; had paid \$350 on account of the purchase money; there was a balance of purchase money still unpaid; and I assume that no conveyance had been executed. The answer, therefore, takes the objection that, except as to \$400 or \$420, the applicant had no insurable interest in the premises when he made his application. But a purchaser, though he has not paid his purchase money, is recognized as having an insurable interest to the full extent of the value of the buildings (b). The answer does not suggest any misrepresentation on this point, as a bar to relief.

Judgment.

The 16th interrogatory was: "If encumbered, state to what amount?" To this the applicant's written answer was: "Mortgaged to Building Society for \$1,500." The fact is, no such mortgage had been given. The Society had agreed to make a loan on the property; a mortgage for the sum named was contemplated at the time of the insurance; and with a view to it the insurance was effected and the premium paid by the Society. The Company's agent knew the facts, and it was because

(a) Vide *Dickson v. Equitable Fire Insurance Co.*, 18 U. C. Q. B. 248; *Park v. Phoenix Insurance Co.*, 19 *ib.* 110.

(b) Vide *Milligan v. Equitable Ins. Co.*, 16 U. C. B. 314.

1867. the mortgage was considered to be "as good as effected,"  
that the written answer was expressed as it was. It is  
not alleged that the unpaid balance of the purchase  
money exceeded, or amounted, to \$1,500; and I presume  
that if the loan transaction had been completed, the So-  
ciety would have required the balance of the purchase  
money to be paid out of the loan. The applicant thus  
omitted to state one incumbrance, and mentioned another  
which did not exist and for a larger amount, but with  
no intention, so far as I can make out, of misrepresent-  
ing the real facts.

Under these circumstances, I do not think the  
defect in the answer to the 15th interrogatory, or the  
inaccuracy of the answer to the 16th interrogatory,  
invalidates the insurance.

Judgment. The Company's answer objects that the application  
represented the building as a new house built of wood,  
and in good condition; while the truth was, that it was  
unfinished; that it was lathed on the outside and not yet  
plastered; that some of the partitions, doors, and win-  
dows were still wanting, and part of the flooring. But  
the applicant did not represent the building as finished.  
Some of the answers in the application shew this; and  
the Company's agent swears that the fact was so. He  
expressly admits, also, that he was told that the chim-  
neys were not yet built, or the doors hung, and that the  
plastering was not done. He does not recollect now any  
other particulars in which he was told that the building  
was unfinished. He did not know that the building  
was lathed on the outside, or that it was to be rough-  
cast; and he thinks that, if he had known that it was  
lathed on the outside, and that the laths were not  
covered, he would not have taken the insurance. But  
he asked nothing as to these particulars; the interroga-  
tories did not render necessary any statement of them;  
and there is no reason for supposing that the insured  
was aware the Company would have deemed them ma-

terial, or that the insured withheld the information intentionally. I think the mere non-statement does not relieve the Company.\*

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 Liverpool &c.  
 Ins. Co.

Some other objections were taken by the answer, but were not supported by the evidence, and it is unnecessary to refer to them.

The Company is to pay into Court the insurance money with interest and costs of suit.

### POWELL V. BEGLEY.

*Injunction—Patent right—Chair-back pump.*

The simplicity of an invention is no reason why a patent in respect thereof should not be protected: where, therefore, by a simple contrivance of cutting away a portion of the log out of which a pump was to be manufactured, thus giving it the form of a chair; and by the introduction into the tube of a conical tube through which the piston worked, the plaintiff had been enabled to construct a force-pump made of wood, for which he had procured a patent of invention, the Court restrained the infringement of the patent.

This cause came on for the examination of witnesses and hearing before the Chancellor at the sittings of the Court at Toronto, in the Spring of 1867. Statement.

Mr. *Bell*, Q. C., and Mr. *Tilt*, for the plaintiff.

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\* The printed application signed by the plaintiff contained at the end the following Memorandum:—"And the said Applicant hereby covenants and agrees to and with the said Company, that the foregoing is a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, value, and risk of the property to be insured, so far as the same are known to the Applicant, and are material to the risk; and agrees and consents that the same be held to form the basis of the liability of the said Company, and shall form a part, and be a condition of this Insurance contract."

1867. *C. S. Patterson and J. C. Hamilton*, for the defendant.

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*Miller v. Scott (a), Smith v. Ball (b), Tetley v. Easton (c), Emery v. Iredale (d), Newton v. The Grand Junction Railway Co. (e), Harwood v. The Great Northern Railway Co. (f), Thompson v. James (g), Lister v. Leather (h), Merrill v. Cousins (i), McCormack v. Gray (j), Ormson v. Clarke (k), Horton McMahon (l), The Patent Bottle Envelope Co. v. Seymer (m), Booth v. Kennard (n)*, were referred to.

Judgment.

VANKOUGHNET, C.—I think the novelty introduced by the plaintiff into the use of, and construction for that use, of wood as a force pump, is entitled to the protection of a patent. It is established that the old wooden log lift-pump has been in use for upwards of thirty years; and though force-pumps are as old, probably, as hills and valleys, it appears never to have occurred to any one to adapt a wooden pump to such a purpose until some three years ago, when the plaintiff so applied it by a contrivance simple enough in itself, but not, on that account, the less ingenious or the less worthy of merit. The frame of the ordinary wooden lift-pump in use previously and since was formed by excavating and boring through a log of pine wood. Through this hollow the piston was inserted, and it was worked by a handle on the outside of the frame. In this way the purposes of a lift-pump were accomplished. But in a frame so constituted the means for providing a force-pump were wanting, and impossible,

(a) 6 U. C. Q. B. 205.

(c) 2 E. & B. 966.

(e) 5 Exch. 331.

(g) 32 Beav. 570.

(i) 26 U. C. Q. B. 49.

(k) 14 C. B. N. S. 475.

(m) 5 C. B. N. S. 164.

(b) 21 U. C. Q. B. 122.

(d) 11 U. C. C. P., at page 117.

(f) 12 L. T. N. S. 771.

(h) 8 Ellis & B. 1004, 1023, 1033.

(j) 7 H. & N. 25.

(l) 16 C. B. N. S. 141.

(n) 3 Jur. N. S. 21.

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as it is proved. To obviate this difficulty, instead of permitting the frame to retain its square or circular form the plaintiff's ingenuity suggested the cutting away about two-thirds of the face of the solid log of wood for about two-thirds of its length, leaving the bottom or lower extremity of the log, say its one-third part, solid. The log thus presented the shape of a rude chair, in itself no novelty, for such forms of chairs were not uncommon in olden times and may be seen now. This shape, however, has given to the pump which the plaintiff has continued to use through the medium of this frame, the name of "The Chair-backed Pump." Now, on the chair-back the piston, worked on the side by a handle, is fastened, and about mid-way down it is divided by a hinge and the lower length passes through an iron belt or groove, so that it descends perpendicularly on to the box or solid part of the log below, or what may be called the seat of the chair, and into an orifice in this seat passing down it through a conical packing box of iron inserted in the seat. This packing-box is of an unusual shape, being conical and inserted in the log seat from below and forced up through the tube cut therein till it reaches nearly the top; being of larger circumference at the bottom than at the top, which gives it its conical shape. By this shape, as well as by an iron band inserted in the top of the upper part of this log-seat at a distance of about half-an-inch from the outer edge of the ring through which the piston passes, whereby the wood forming the ring is held firm and tight in its place, the position of the packing-box is secured, and there is no chance of its becoming loose or being forced upwards, unless the chair or log which holds it gives way. Well, by this contrivance of sending the piston down into the tube of this otherwise solid portion of the pump frame or body, through the packing-box so tightly closed as to exclude all air, the power of forcing up water is obtained. It is clear, and is admitted that this could not be effected in the old enclosed pump or chamber, because

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it would be necessary to remove the facing of it to secure a perpendicular descent of the piston and to prepare the lower part of it for the reception of the piston, and for the packing-box. Now, to whom did this notion, this new idea of so preparing the pump-body or frame as to serve the purposes of or furnish the means for employing a force-pump occur, but to the plaintiff? It is clear that he, by this alteration, converted the old wooden lift-pump into a shape which enables the forcing power to be used in and by it. During the many long years the wooden-pump has been used, this idea does not suggest itself to any one, but to the plaintiff; and it seems to me that it has that merit of invention which falls within the language of the Lord Chancellor in *Penn v. Bibby*, 2 Ch. App. Law Rep. 127. His Lordship there after speaking of the difficulty of laying down any rule in such matters says: "In every case of this description one main consideration seems to be, whether the new application lies so much out of the former use as not naturally to suggest itself to a person turning his mind to the subject, but to require some application of thought and study. Now, strictly applying this test, which cannot be considered an unfair one, to the present case, it appears to me impossible to say that the patented invention is merely an application of an old thing to a new purpose."

Judgment.

The usefulness of this invention of the plaintiff is not questioned. To the farmers it must be of the greatest possible value. At a cost of \$5 more than the ordinary lift-pump—a cost in all of from \$25 to \$30—a forcing apparatus can be applied to the chair-shaped pump, by which, as is proved, a stream of water of considerable volume can be thrown a distance of from eighty to one hundred feet. Consider the great advantage of this on isolated premises, where fire engines are not to be had: the farmer can use the pump for all ordinary domestic purposes with greater ease than he can the old-shaped

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Judgment.

one, for it is proved to work more easily—though if this had been its only merit a patent for it could not have been sustained, I think; but, in an emergency, with little if any more force applied to it, he can by attaching a hose convey water to buildings on fire within a hundred feet, and more, of the pump, and will most probably thus extinguish the flames. One man, or as some of the witnesses say, a child, can produce, by working the pump, a sufficient stream of water for this purpose. No doubt, force-pumps, with perpendicular pistons, constructed of metal and permanently affixed to walls or solid frames, have been in use for many a year; but, an ordinary wooden-pump, never, until adapted to the purpose by the change which the plaintiff has introduced. It is said, however, that the defendant is not infringing the plaintiff's patent because he does not supply to the pump, manufactured and sold by him, the appliances necessary to work it as a force-pump. True; but by adopting the chair-back shape, he enables those to whom he sells to make these appliances, without any necessity for the plaintiff's aid, and without any notice to him. It would be a great grievance and wrong to the plaintiff to tell him that he must search all over the country for every individual who converts one of the pumps sold by defendant into a force-pump, and apply to the Court for an injunction against him. The man who, by disposing of the plaintiff's contrivance puts it in the power of others to interfere with the plaintiff's patent right is the wrong-doer, and should be punished. The chair-back shape is the contrivance, and, on the evidence, the only contrivance, by means of which a force-pump of wood can be formed and used—and it is not valuable for any other purpose of a pump. The old style of pump answers the purposes of the ordinary lift-pump as well, and the use of the chair-back shape can have no other advantage than to enable the possessor of it to turn it into a force-pump. The evidence shews that the defendant adopted in manufacture this form of pump, with the deliberate intention

1867. of damaging the plaintiff; and its importance as a novelty in his estimation, is established by his marking on the article when exposed for sale, "Begley's Patent." This is a fraud upon the public; and the defendant cannot complain if he is judged by his own estimate of the importance of the invention. I had occasion to make some remarks upon the effect of such conduct in a case of *Walker v. Alley* (a). It is contended that the specifications do not sufficiently describe the invention. They are not very artistically prepared, and the language is somewhat obscure and vague, but probably not so much so to mechanics and farmers as to those accustomed to more choice and accurate expressions; still, I think, they in substance describe the invention as a wooden force-pump, provided by a chair-back shape or frame, with a piston passing through an iron groove fastened on the back of the chair, and working in its lower half perpendicularly into the chair-bottom through a tightly enclosed and secured conical iron packing-box.

Judgment.

I decree a perpetual injunction and account with costs.

### ROSEBURGH V. FITZGERALD.

*Costs—Second suit for same purpose.*

A bill having been filed by one of the *cestuis que trust* of a settlement to enforce the trusts thereof, the defendant denied that the plaintiff had any interest under the settlement. Thereupon, by the advice of counsel, a bill was filed for the same purpose by another of the *cestuis que trust*, against whom the objection did not apply, and he being an infant, the plaintiff in the first suit was named as his next friend. Both suits proceeded to a hearing when the Court consolidated them, making one decree as prayed, and giving the plaintiff in the second suit his costs.

This was a case heard before the Chancellor, at Peterborough, in the Spring of 1867. In another suit heard

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(a) Ante p. 366.

at the same Court of *Stinson v. Fitzgerald*, the trusts created in favor of the plaintiff as one of the *cestuis que trust* were clearly established; and a breach of trust having been shown, the fund was directed to be returned: before any decree, however, could be drawn up, the present case was heard.

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Roseburgh  
v.  
Fitzgerald.

Mr. *Crooks*, Q. C., and Mr. *Elias Burnham*, for the plaintiff.

Mr. *Blake*, Q. C., and Mr. *C. Weller*, for the defendant.

VANKOUGHNET, C.—This is a suit by one of the *cestuis que trustent*, under the trusts declared in the last suit.

Mr. *Edmunson*, Solicitor, says that he received instructions from *Alexander Roseburgh*, the infant plaintiff, to file this bill, and that *Stinson* reluctantly acted as next friend. Judgment.

“I filed this second bill under advice of a Queen’s Counsel, in consequence of the answer of the defendants in the suit of *Stinson*, denying his title as *cestui que trust*.”

As to the costs, I think the plaintiff must have his costs, as the answers of the defendants denying the right of *Stinson*, the plaintiff in the other suit, to any share in the settlement, rendered it unsafe for the infant plaintiff here, the *cestui que trust*, to embark in the same vessel with *Stinson*, as if the defendants had been able to oppose to *Stinson*’s progress, the case set up in this answer, *Stinson* must have been shipwrecked. The Court could do nothing but dismiss his bill and all rights which might have been dependent on it. I think the plaintiff here was not bound to wait to see the issue of *Stinson*’s suit. The defendants have themselves

1867. justified this second suit, by their mistaken defence to *Stinson's* bill.

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Let it be incorporated with the first suit and it will then be unnecessary to add any more of *Daniels'* children, as the plaintiff can represent them in the Master's office.

### ROBINSON V. BYERS.

*Married woman—Alienation of her estate—Form of certificate.*

Where the certificate signed by two Justices of the Peace endorsed on a conveyance by a married woman as to her consent to part with her estate, &c., omitted to state in the body thereof any place where the execution of the deed or the examination of the married woman took place, but, in the margin, the County of Prince Edward was given as the place wherein the Justices were authorized to act.

*Held* that such certificate sufficiently complied with the Statutes respecting the alienations of the estate of married women.

Hearing *pro confesso*.

Mr. *Hodgins* for the plaintiff.

**Judgment.** VANKOUGHNET, C.—This is a bill for foreclosure of an estate included in a deed executed by a married woman jointly with her husband, to secure the repayment of a certain sum of money. On the back of the deed is indorsed the following certificate by two Justices of the Peace, who also appear to be the subscribing witnesses to the execution of the deed, viz. :

“*County of Prince Edward, to wit* : We, the undersigned, two of Her Majesty's Justices of the Peace in and for the said County, do hereby certify that on this day *Ann McCuien*, in the within deed by way of mort-

gage mentioned, appeared before us, and was examined by us apart from her husband, and did give her consent freely and voluntarily to depart with her estate in the within mentioned land without coercion or fear of coercion on the part of her husband or of any other person whatsoever, which deed was this day executed in our presence.

SAMUEL JONES, J. P.

RICHARD NOXON, J. P.

Dated the 29th day of July, 1857."

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v.  
Byers.

The deed bears the same date as the certificate. The certificate is, in all respects, substantially correct, except in the omission of the statement of the place at which the deed was executed and the examination took place. The case is governed by the Statute 59 Geo. 3, ch. 3; 2 Geo. 4, ch. 13; 1 Wm. 4, ch. 3; 2 Vic. ch. 26; and 14 & 15 Vic. ch. 115, and the curative provisions of the 22nd Vic. ch. 35, so far as they can help. The question is whether I can presume that the deed was executed in the County of Prince of Edward and near the place stated by way of venue in the margin at the beginning of the certificate as a substitution for the statement of a place in the body of the certificate. The Statute merely requires the certificate to be to the effect given in the form. It is very foolish, and may be attended with very great risk, that persons should depart from a prescribed form, easy to follow, and adopt one of their own. There can be no difficulty in following the form given, and it would seem much more easy to adopt it than invent a new one. It is very stupid in those signing and giving a certificate not to adhere to it. Still the fault is theirs—and where there has been a substantial compliance with it, should the party claiming under the deed be defeated? He cannot be considered altogether an innocent party, for he should take care to see that he obtains a proper certificate. On the maxim that all things are presumed to be rightly done by those in

Judgment.

1867. authority, I think that I may assume here that the examination, execution of the deed, and certificate thereof, all took place in the County of Prince Edward before these two Justices, who I must assume were Justices of the Peace for that County. *Allanson v. Redman* (a). *Tiffany v. McCrumlin* (b), *Jackson v. Robertson* (c), Section 4 of the 22nd Vic. ch. 35, provides as to deeds executed before the 4th of May, 1859 (as the deed here was), that whenever the requirements of the law respecting the execution of conveyances by married women had been complied with, such conveyance shall be effectual to pass the estate of the married woman, though the certificate endorsed on the deed be not in strict conformity with the forms prescribed by the Acts in force at the time. Section 1 of the same Act also provides as to deeds executed by married women before the 4th of May, 1859, that the certificate of the Justices shall be valid although they were not at the time residents of the County in which the married woman resided. Although it may be doubted whether the statement of the place where the execution and examination took place is a mere matter of form, still the necessity for its statement is of much less importance in regard to deeds which may be executed before, and certified by Justices any where in Upper Canada, as it can hardly be supposed that they would act out of the Province.

Judgment.

Upon the whole, I think the certificate may pass as sufficient.

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(a) 14 Q. B. U. C. 459.

(b) 13 Q. B. U. C. 159.

(c) 4 C. P.

1867.

## IN RE LAMBE.

*Insolvency.*

The County Judge has a general jurisdiction in matters of insolvency, and may sanction a suit in the name of the assignee for the benefit of the estate, notwithstanding a majority, both in number and value, of the creditors pass a resolution forbidding further proceedings.

An order to that effect having been made by the Judge, the assignee appealed therefrom in the interest of the creditors whose transactions the suit impeached for fraud, and the appeal was dismissed with costs; the Court observing that it was not the duty of the assignee to appeal from such an order at the expense of the estate.

This was an appeal by the assignee of an insolvent from an order of the Judge of the County Court of the County of Carleton, dated 11th December, 1866, dismissing, with costs, a petition which the assignee had presented for the rescission of a previous order of the Judge which had been held valid by the Court of Common Pleas, as reported in the 17th volume of the Reports of that Court, at page 173.

Mr. *J. A. Boyd*, for the appeal.

Mr. *Fitzgerald*, contra.

MOWAT, V. C.—This was an appeal by the assignee of an insolvent from an order of the Judge of the County Court of the County of Carleton, dated the 11th of December, 1866, dismissing with costs a petition the assignee had presented for the rescission of a previous order of the Judge, which has been held valid by the Court of Common Pleas (*a*).

The respondents, being creditors of the insolvent, were desirous of impeaching certain transactions between the insolvent and other creditors, or alleged creditors, of the

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(a) 17 U. C. C. P. 173.

1867. insolvent, on the ground of fraud. At a meeting of the creditors on the 27th of February, 1866, a motion was made that the assignee should take steps by bill in Chancery or otherwise for this purpose. This motion was supported by a majority in number, and opposed by a majority in value, of the creditors, including amongst the latter the creditors whose transactions were impeached. A motion to adjourn the meeting was supported and opposed respectively in the same way, the opposing creditors hoping thereby to prevent the Judge from deciding the question under sub-section 2, section 11 of the Insolvency Act of 1864, which provides as follows:—"If the majority in number do not agree with the majority in value, the meeting may be adjourned for a period of not less than fifteen days, of which adjournment notice by advertisement shall be given; and if the adjourned meeting has the same result, the views of each section of the creditors shall be embodied in resolutions, and such resolutions shall be referred to the Judge, who shall decide between them."

In re  
Lambe.

Judgment.

No adjourned meeting, therefore, took place; but in July, the respondents applied by petition to the Judge for leave to file a bill in the name of the assignee. On the 20th of July, the Judge granted the application, and ordered the applying creditors to indemnify the assignee against the costs. The assignee appealed against this order to the Court of Common Pleas, and that Court dismissed the appeal.

On the 28th of August, 1866, and while this appeal was pending, another meeting of the creditors was called, the legality of which for the present purpose is disputed by the respondents. At this meeting a resolution was moved directing that no proceedings, directly or indirectly, at law or in equity, should be taken by the assignee against any party or parties whomsoever (except to close the appeal to the Common Pleas), and that he should

not allow his name to be used in any such proceedings. Three creditors who had previously voted in favor of proceeding, voted for this resolution, thereby giving it the support of a majority in number as well as value. The assignee thereupon (29th of November, 1866) applied to the Judge to rescind his former order; and on the 11th of December, the Judge dismissed this petition with costs, stating, however, that the costs would, he presumed, be allowed to the assignee out of the assets, but not then making any order to that effect. From the order made on this application, the assignee has brought the present appeal.

1867.

In re  
Lambe.

It was argued for the appeal, that the Judge has no authority except when there is a difference between the majority of the creditors in value and the majority in number; and that a majority in both number and value having voted for a stay of proceedings in respect of the impeached transactions, it was the duty of the Judge to give effect to their resolution. But I find that the Court of Common Pleas, in dismissing the appeal from the order which was before that Court, held that the jurisdiction of the Judge was not confined, as the appellant contended there and again contends here, to a case in which there is a difference amongst the creditors: that, independently of the enactment on which the appellant relies, the Judge has a general jurisdiction under which he had authority to make the order. I think that if the authority to make the order of July did not depend upon the difference between the majorities, it follows logically that the right of the Judge to maintain the order is in the same position; and that investigation cannot be defeated by the mere circumstance of the majority in number having now been induced to concur with the majority in value in a resolution to stay the suit.

Judgment.

1867.

In re  
Lambe.

I would be sorry to have found that the Judge had not the jurisdiction to make these orders, the reasonableness of which, if he had the jurisdiction to make them, is not disputed. The Legislature certainly did not mean to put it in the power of an insolvent to give a preference to a majority in number and value of his creditors to the prejudice or exclusion of the minority, or to deprive the latter of all remedy if the insolvent should attempt such a preference; and it is admitted that this would be the effect of the construction of the Act which the appellant contends for. I am glad the Court of Common Pleas saw their way to the adoption of a different view of the Statute; and I see no reason for not following their decision.

Judgment.

The assignee's application to the Judge to rescind his order was, perhaps, not improper; and when the assignee claims the costs out of the estate, it is quite probable that the circumstances may warrant their payment; but I must add that I do not think his duty required him to appeal at the expense of the estate from the order which the Judge made refusing the application (a).

Appeal dismissed with costs.

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(a) Vide *In Re Stulze's Trusts*, 4 DeG. McN. & G. 404; *Exp. Hope* 3 DeG. & J. 94.

1867.

## THE BANK OF MONTREAL V. MCTAVISH.

*Fire policy seizable under execution.*

A fire policy, after a loss has taken place, and money has become payable thereon, is such a specialty or security for money as is seizable under execution, though the amount payable has not been ascertained.

Where such a policy was verbally assigned to a creditor by a person in insolvent circumstances, in satisfaction of a debt not due, and in consideration of an advance of money at the time, the assignment was held void, as a fraudulent preference within the Consol. Stat. U. C., Ch. 26, Sec. 18.

Hearing at Toronto before Vice-Chancellor *Mowat* on evidence, taken partly before him at Stratford at the sittings of the Court there in the Spring of 1867, and partly afterwards before the examiner by consent.

Mr. *Blake*, Q. C., for the plaintiffs.

Mr. *Moss* and Mr. *Rae* for the defendants.

MOWAT, V. C.—The plaintiffs are execution creditors of the defendant *William M. Cardell*; and the substantial object of the bill is to obtain payment upon their execution of the amount due on a Fire Policy, dated 12th August, 1864, and under which the defendants *The County of Perth Mutual Fire Insurance Company*, who are the insurers, became liable in respect of a fire which took place on the 19th October following. Before the amount to be paid on the policy had been adjusted with the Company, viz., on the 19th December, 1864, *Cardell* assigned this policy to the defendant *Alexander McTavish*, in satisfaction of three promissory notes then held by *McTavish*, and to which *Cardell* was a party, and in consideration of a further sum of \$100 in cash. The notes were not due at the time of this transaction. The Plaintiffs contend that this assignment was a fraudulent Judgment.

1867. preference within the meaning of the Statute, U. C.,  
Con. Ch. 26, Sec. 18. The plaintiffs were creditors of  
*Cardell* at this time.  
The Bank of  
Montreal  
v.  
McTavish.

Judgment.

I am satisfied from the evidence that at the time of this assignment, *Cardell* was in insolvent circumstances, and unable to pay his debts in full; that both he and *McTavish* were aware of this at the time of negotiating for the transfer; that the object of *McTavish* in advancing the \$100 was to obtain a preference over *Cardell's* other creditors to the extent of the balance; and that *Cardell* intended he should have this preference, and made the assignment with that intent. *Cardell* was more anxious, I have no doubt, to get the \$100 than to give a preference to *McTavish*; what he wanted that sum for, or what use he made of it, does not very distinctly appear: the evidence furnishes no ground for supposing that he wanted it for any emergency of business, or that he applied it to any purpose of which his creditors, directly or indirectly, got the advantage.

It does not seem to me to be material for the plaintiffs to make out that the intent to prefer was the assignor's sole intent, or even principal motive, in making the assignment. I think it sufficient that the preference was one intent, and am of opinion that any other motive which operated with the assignor, was not of such a character as to render this intent harmless in reference to the policy of the Act.

There was some forcible argument at the bar as to whether notice by *McTavish* of his debtor's insolvency was material to the plaintiff's case; but it is unnecessary for me to express any opinion on that point, as I think he had such notice.

The Sheriff is authorized by the 261st section of the

Common Law Procedure Act to "seize specialties or other securities for money." A fire policy under seal after money has become payable thereon, is certainly within these words; and I have failed to satisfy myself that the fact of the amount to be paid not having been ascertained and liquidated before the assignment, or of the policy being in a Mutual Insurance Company—circumstances relied on by the defendant—constitutes any solid ground for holding that the policy was not within the meaning, as well as the words, of the Statute. I must therefore decree for the plaintiffs.

1867.  
The Bank of  
Montreal  
v.  
McTavish,

Part of the consideration for the assignment was money advanced at the time, but, the assignment being void as a fraudulent preference, *McTavish* could not, I think, in equity, any more than at law (a), claim to hold it as a security for the advance or any part of it.

After the assignment, *Cardell* agreed with the Company to accept \$300 in full, in respect of his loss, and the plaintiffs acquiesce in this agreement. I understood all parties to admit that more than that sum was due the plaintiffs on their execution. If so, the decree will be for payment to the plaintiffs of that sum by the Company, less the Company's costs of this suit. The plaintiffs will add the Company's costs to their own, and are entitled to both against the other defendants. If it is not admitted that so much is coming to the plaintiffs on their execution, there must be a reference to ascertain the amount.

Judgment.

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(a) *Lempriere v. Pasley*, 2 T. R. 485; *Ayling v. Williams*, 5 C. & P. 401; *Featherstone v. Hutchinson*, Cro. Eliz. 199; *Scott v. Agilmore*, 3 Taunt 226; *Thomas v. Williams* 10 B. & C. 671; *Ferguson v. Norman*, 6 Sc. 810; *Higgins v. Pett*, 4 Exh. 324.

1867.

## BEEMAN V. KNAPP.

*Voluntary conveyances—Conveyances in consideration of maintenance.*

A conveyance by a man, 84 years of age, of his farm, which was almost his only means, to his married daughter, subject to a provision that she should properly maintain him, but with no personal liability on the part of any one to see to his maintenance, was held to be a deed of gift, and only sustainable by the same evidence as is necessary in equity to maintain a deed of gift.

A like deed made two days afterwards to the grantor's son, who had managed the farm for some years along with farms of his own; the consideration for the conveyance being the son's personal bond, to maintain the grantor and his wife during the rest of their lives, without any other security: *Held*, not valid unless shewn to have been made freely and voluntarily after independent and proper advice.

*Held* also, that such a conveyance, unless made freely and voluntarily, after independent and proper advice, was not made good by evidence of a verbal agreement several years before, that the son should work the farm and maintain his father and mother in consideration of the property being left to the son by will; a deed and will being essentially different.

## Statement.

This cause came on for the examination of witnesses and hearing before Vice-Chancellor *Mowat* at the sittings of the Court at Sandwich, in the Spring of 1867.

Mr. *Strong*, Q. C., and Mr. *Albert Prince*, Q. C., for plaintiffs.

Mr. *O'Connor* for defendants.

*Black v. Black* (a), *Dickenson v. Burroughs* (b), *DeHogton v. Money* (c), *Rice v. Rice* (d), *Mundy v. Joliffe* (e).

(a) 2 U. C. Err. &amp; Ap.

(c) 1 L. Rep. Eg. 154.

(e) 5 M., &amp; C.

(b) 1 L. Rep. Eg. 337.

(d) 2 Drew 73.

MOWAT, V. C.—In this case there is a struggle between a son and daughter as to which shall have their father's property, the father being still alive. The daughter claims under a deed from the father, dated 17th September, 1866, and the son under a deed, dated two days afterwards. The suit is by the son to have the deed to his sister cancelled as a cloud on his title. The conclusion to which I have come is that neither deed is valid.

1867.

Beeman  
v.  
Knapp.

The property consists of a farm of 75 acres, partly cleared, on which the father, with his wife, the mother of the litigants, have lived since the year 1812. It is sworn to be worth \$2,000. The father is 84 years old, and very feeble. His wife is 77, and considerably more vigorous. It does not appear from the evidence that they have any property, real or personal, except the farm and their household effects, and two promissory notes given by the son to his father many years ago, and, I presume, long since barred by the Statute of Limitations. Judgment.

The daughter's deed purports to convey the farm to her and her heirs, subject to a proviso that she should provide and supply a comfortable subsistence for the support and maintenance of the grantor during his lifetime in such style of living as he had theretofore been accustomed to, and that he should have the free use during life of the dwelling house now occupied by him on the lot. The deed contains the usual limited covenants for title.

The old man says he executed this deed under the supposition that it was a power of attorney authorizing his daughter to receive a sum of money which was due to him. But the conclusion to which I have come on the whole evidence is, that he knew that the instrument was a deed of the property, and not a power of attorney;

1867. and that it was obtained from him by his daughter without any fraud or bad faith.

Beeman  
v.  
Knapp.

Judgment.

It is claimed to be a deed for valuable consideration, because of the proviso for the old man's maintenance; but clearly that is not the character of the instrument. The maintenance of the old man would have been an inadequate consideration for the conveyance; but the grantor had no personal security even for his maintenance, nor security of any kind beyond a mere lien for it on the land he was conveying. This lien he reserved, and subject to it the deed was a gift of the land to the grantee. As such it cannot be maintained—embracing, as it did, the whole real estate of the grantor, and very nearly the whole of his means of every kind; making no provision for his wife; and placing him at the mercy of his daughter and her husband for the maintenance he should have; a suit at law or here, with all its cares, anxieties, and difficulties to an old man, and its costs, being his only remedy, and being practically in such a case no remedy at all; and the deed having been executed without the full information as to the effect and consequences of the deed, or the deliberation and independent advice, necessary, in the circumstances of the parties, to give validity in equity to such a transaction (*a*). As the plaintiff fails to make out his own case, I do not think it necessary to say more in regard to the invalidity of the deed to the daughter.

The plaintiff is the only surviving son. His father many years ago conveyed to him first fifty acres, and then fifty acres more, of the lot of which the land now in question is the remainder. His father took a note in each case as for purchase money, but neither note has been paid, nor probably was intended to be paid. These

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(*a*) Sharp v. Leach, 31 Beav. 494.

1867.

Beeman  
v.  
Knapp.

are the two notes I have referred to already. Afterwards, and ten or eleven years ago, the plaintiff, at the request of his father (then about seventy-three or seventy-four years of age and not able to work much), moved, to a site near his father's dwelling, a small house which was standing on another part of the lot, and which the old man had some time before assisted his son to build. Thenceforward the son lived in this house with his family, managing his father's farm in common with two farms of his own, using for this purpose the old man's stock, in common with his own, and each receiving so much of the produce as he needed. This was done on the statement of the father that on his death he would leave the place to the plaintiff; and the old man made a will to carry out this intention. The plaintiff has made some improvements on the place, the value of which does not appear to be stated in the evidence.

Judgment

So matters went on until shortly before the execution of the deeds now in question, when the old man made a new will (the old one having been lost), giving the farm to the plaintiff, but on condition of his paying a sum of money to his sister. This coming to the knowledge of the plaintiff, he, on the 11th September, got a lawyer's letter written to his father in the following terms :

“*Sandwich*, 11th Sept., 1866.

“Mr. CHESTER BEEMAN, Colchester.

“Sir,—I am instructed by your son, Mr. *John Beeman* to commence proceedings at law against you, in consequence of your breaking your agreement with him to give him the farm, stock, etc., upon which he has expended his labor and made improvements for many years past. He says that your will (recently made) only gives him the farm on condition of paying a sum of money to his sister, which, being no part of the origi-

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Beeman  
v.  
Knapp.

nal bargain, of course puts an end to it, and enables your son to recover from you the value of his services and improvements, and moneys paid for you (including the judgment of John P. Park for \$150 odd and interest), which amounts altogether to something over \$1000. Of course your son has no desire to push matters to extremities, and the object of this letter is, that you may consider again the matter; and if you wish to avoid the cost of legal proceedings, and the scandal of a suit of this kind between relations, you may have the opportunity of doing so. In the event of your determining to persevere in your present disposition of your property, you must please to consider this as the last notice you will get before a suit is commenced.

“Your ob’t servant” &c.

Judgment. The day of receiving this letter does not appear; and the old man does not seem to have consulted anybody as to the claim set up in it, or the threat it communicated, unless it was his daughter and her husband. On the evening of the 17th, which was after the receipt of the letter, he made the deed to his daughter. His wife, with whom her son is evidently a greater favorite than her daughter, being aware that a paper had been executed, and suspecting, though not knowing, its nature, scolded her husband and daughter about it, in no mild or pleasant terms, that evening and the next morning. On the day following, namely, on the 19th, the old man sent word to his son that he was willing to execute a deed of the place to him; a country conveyancer was thereupon sent for; and the deed and a bond were prepared and executed the same day. The bond was by the plaintiff to the old man and his wife, in the penal sum of \$1000, conditioned for providing them during their natural lives, respectively, with a sufficient quantity of good and comfortable board, lodging, and clothing, in and on the premises they then occupied, together with sufficient medical attendance when required.

Under these circumstances, it is contended that the plaintiff's deed is valid, having been executed in pursuance of an agreement entered into so many years before, and acted upon ever since. But the alleged agreement was not an agreement for an irrevocable deed—which would take effect immediately, but for a will—which would not go into effect until the old man's death—two things essentially different. Even in favor of this agreement, acted upon as it is said to have been, this Court would probably not interfere during the old man's life, though if faithfully kept by the son the Court might not, after his father's death, refuse to give effect to it, under the circumstances and on the evidence now before me—taking care to secure to the widow, if then living, a proper maintenance during the remainder of her life; for I do not see that there was any fraud or other misconduct of the son when the agreement was made, or that there has been any in the way in which he has hitherto performed his part of it. But a deed to take effect forthwith is certainly no execution of an agreement to make a will, and the essential difference between the two things was surrendered by the old man without any consideration to sustain the surrender.

1867.

Beeman  
v.  
Knapp.

Judgment.

Viewing the deed therefore, as I must do, not as an execution of the old bargain, but as a new transaction, it is manifestly open to several of the objections which render invalid the defendant's deed, and to some others; for the plaintiff was in a position of far greater influence towards the old man than the defendant was: the plaintiff had for years managed the old man's business; and the latter had leaned on his son to make his property available for his maintenance, and in fact had been dependent on him. The plaintiff had also alarmed his father by the threat of a lawsuit in his old age, with his only son, for a demand so large that if obliged to make it good he could only do so by giving up his farm. The plaintiff had also on his side the active

1867. and zealous influence of his mother, the only other inmate of his father's house. It was under all these influences that the plaintiff's deed was obtained.

Beeman  
v.  
Knapp.

*Prima facie*, a conveyance of all a man's property in his old age, without any power of revocation, in consideration of a mere promise of maintenance, whether under seal or not, is extremely improvident (*a*).

Judgment. Such a promise can only be enforced by a suit—which is practically out of the question, and the obligees become really dependent on the mere will, not to say continued ability, of the obligor, with no other security than the latter's sense of justice and filial duty. Indeed, the right which, independently of contract, the statute 43 Eliz. ch. 2, sec. 7, gave "every poor old, blind, lame, and impotent person, or other poor person not able to work," to maintenance by his children "being of sufficient ability,"—was more valuable than any right which this bond gave; inasmuch as the remedy which the statute provided involved no expense or delay, and no trouble beyond what such a person might be capable of.

Further, the obligor may die before the obligee, and the principal purpose of the transaction would then be lost.

Again, there was no mortgage given to secure the due fulfilment of the obligation; no lien on the land was reserved by any instrument; and any lien implied by this Court could not be registered; and, through the imprudence or misfortune of the son, even without fraud, the property might pass into the hands of a purchaser without notice of the old man's rights, and he and his wife be left houseless and penniless to the charity of

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(*a*) *Harvey v. Mount*, 8 Beav. 450.

strangers. Such sad results have actually followed such transactions. 1867.

Beeman  
v.  
Knapp.


Considering the relation of the parties, the transaction in question could only be sustained on evidence of the fullest information to the grantor as to these possible consequences of what he was doing; and evidence of his having had competent independent advice; and of his having, in executing the deed, acted freely and deliberately, and with full knowledge of the position in which the transaction was placing him (*a*). No such evidence is to be found here.

A prudent adviser would, for example, have said that, if a deed was to be executed at all, it should, at the very least, contain a power of revocation at the will of the grantor, the grantee in that case receiving, if it was so agreed, a fair compensation for what the grantor should up to the time of the revocation have received from him; and that such other precautions should be adopted and arrangements made, that, if maintenance should thereafter be withheld, or an inadequate maintenance be given, the grantee, his heirs and assigns, could not keep the property, leaving the old man—in his helpless feebleness and poverty—to bring suits at law from time to time for damages, or a suit here for like relief, without having the means of paying the costs of carrying on the suits, or the means of maintaining himself in the meantime; leaving him to prove, if he could, insufficient or fitful supplies, and consequent suffering—which himself and his wife might alone know; and leaving him, if, through the good offices of third persons, he succeeded before the Courts, and was maintained during the litigation, to enforce how he could, the judgments he might obtain in his favor. A mere bond like that given by the plaintiff, viewed as a security for the peaceable, comfortable, and

Judgment.

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(*a*) Sharp v. Leach, 31 Beav. 694.

1867.  Beeman  
v.  
Knapp. sure maintenance of the old couple during the remainder of their lives, after parting with all their property, was manifestly a delusion; and I say this without questioning that the bond was given in good faith, and with the intention of faithfully fulfilling its condition.

Judgment. It has lately been held by the Master of the Rolls in England that equity should not interfere against a voluntary deed, in favor of a subsequent conveyance for value (a). But the opposite rule having been acted on in this country (b), I have had to consider whether the plaintiff's deed was of such a character as to entitle him to relief on the authority of the decisions here.

My opinion being against both deeds, I dismiss the plaintiff's bill without costs.

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#### GOFF V. LISTER.

*Unpatented lands—Unregistered assignment—Express notice.*

Express notice of an unregistered assignment of unpatented land has the same effect as like notice of an unregistered conveyance after patent issued.

A purchaser from the Crown assigned his contract for a valuable consideration duly paid. The assignee died soon afterwards without having registered his assignment, and the assignor subsequently executed an assignment to another person for a trifling sum, the second assignee having had express notice of the prior sale; but he registered his assignment and obtained the patent: *Held*, that he took, subject to the rights of the heirs of the first assignee.

Hearing before Vice-Chancellor *Mowat*, at Chatham, at the spring sittings, 1867.

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(a) *DeHogton v. Money*, 1 Law Rep. Eq. 154. See also *Oxley v. Lee*, 1 Atk. 625.

(b) *Vide Ross v. Harvey*, 8 Gr. 649.

Mr. *Strong*, Q. C., and Mr. *Woods*, for the plaintiffs. 1867.

Mr. *Blake*, Q. C., for the defendant.

Goff  
v.  
Lister.

MOWAT, V. C.—On the 17th of April, 1854, *Thomas Alexander Ireland* contracted for the purchase from the Crown of lot No. 22, in the 4th concession of Enniskillen, 200 acres, at \$1 50 an acre, and paid \$30 as the first instalment. The price appears to have been much less than the value of the lot at the time, for *Ireland* soon afterwards, and without having made any improvements in the meantime, sold his interest in the lot to *Willis Brown* and *Samuel Goff* for \$600 cash, and received the purchase money. In pursuance of this sale he, on the 24th of September, 1855, assigned the west half of the lot to *Brown*, and the east half to *Goff*, subject to their paying the balance due to the Crown. *Brown* appears to have registered his assignment, and no question respecting his half of the lot has arisen; but *Goff*, who was a colored man, died in Indianapolis (U.S.) soon after his purchase, without having had his assignment registered, leaving his children, now plaintiffs in this suit, infants. One of them has become of age since the filing of the bill, and all have resided in Indianapolis ever since their father's death. The deceased left no will. Property in Enniskillen having lately risen in value, and the defendant *Lister* (an attorney) having learned that *Ireland* appeared in the books of the Department as the purchaser of the whole lot, and as having assigned the west half only, and the Crown not having cancelled the sale, *Lister* applied on the 1st of January, 1866, to *Ireland*, then in poor circumstances, respecting the east half of the lot, and agreed to give him \$100 for his signature to a release of that half. *Ireland* told him of his having sold the whole lot, and having been paid for it, years before; though he could not account at that distance of time for there being an assignment of the west half only, as *Lister* assured

Judgment.

1867. him was the fact. *Lister* no doubt hoped that, by first registering an assignment to himself, he would get priority over the party entitled to the east half under the former sale. The release to *Lister* was executed on the same day, and registered on the 3rd of January. *Lister* paid the balance due to the Crown in respect of the half lot, and a patent issued to him on the 20th of January. On the 25th of January he entered into an agreement for the sale of the north fifty acres to one *Pringle* for \$875, which has since been paid; and *Pringle's* interest afterwards becoming vested in the defendants *Clark* and *Daintry*, *Lister* on the 21st of February conveyed the fifty acres to them. Meanwhile, namely, on the 26th of January, this bill had been filed, and *lis pendens* registered. On the 15th of March, *Lister* contracted for the sale of the other fifty acres for \$3000, part cash, and the residue to be paid on or before the 10th of May, 1866, provided *Lister* should procure the entry of *lis pendens* to be removed by that date; but this transaction having been subsequent to the registering of the *lis pendens*, and no conveyance having been executed, the vendees have not been made parties to the suit.

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It was not suggested that *Clark* and *Daintry* stood in any better situation than *Lister*; and the only question on which I reserved judgment was, as to whether the registration of the assignment to *Lister* gave him priority over the plaintiffs, he having had notice before he took the assignment that *Ireland* had already sold his interest and been paid for it, and that he had no further interest in the property. To take a second assignment under such circumstances, in order by means of it to hold the property against the plaintiffs, the true owners, was manifestly as gross a fraud on the part of *Lister*, as if he had himself sold the property to *Goff*; and the question I have to decide is, whether the fraud is without remedy.

The Public Lands Act then in force (*a*) provided, like the present Act, for the keeping of a Registry-book by the Commissioner of Crown Lands, for the registration of assignments of claims to unpatented lands, and enacted that every assignment entered or registered as therein mentioned "shall be valid against any one of a previous date or execution, but not then entered or registered."

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The language of the English Registry Acts is quite as strong as this; for these acts (*b*) provide that every deed or conveyance "shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration," whose deed has priority of registration. The Irish Registry Act (*c*) contains a similar provision. The earliest case as to the effect of notice of an unregistered conveyance appears to have occurred in Ireland, and it was held that express notice deprived the subsequent purchaser of the benefit of his prior registration. This decree was affirmed by the House of Lords (*d*); and the doctrine thus established has been the rule ever since in both kingdoms. A like construction has been put on a similar enactment in the County Registry Acts of this country. I may observe also, that the rule is, up to this day, nearly the same in all the American States (*e*).

Judgment.

Comparing the language of the enactment in question here (*f*) with the language of the general Registry Acts, I find it impossible to hold that notice of an unregistered instrument is material under the latter and

(*a*) 16 Vic. ch. 159, sec. 7.

(*b*) 2 & 3 Anne, Ch. 4, 20 and 35; 8 Geo. 2, ch. 6.

(*c*) 6 Anne ch. 2. *Bushell v. Bushell*, 1 S. & L. 98.

(*d*) *Lord Forbes v. Denniston*, 2 Bro. P.C. 425.

(*e*) See 1 Washburn Real Py., 2nd ed. 594.

(*f*) 23 Vic. ch. 2, sec 18.

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not under the former. Being in *pari materia* (a) the enactments must clearly receive the same construction. Indeed the argument for giving effect to unregistered instruments of which a registered claimant had notice at and before acquiring his claim, is stronger as applied to the enactment in the Public Lands Act, than to the corresponding enactments in the other Statutes referred to, inasmuch as the former does not, like the latter, profess to enable all deeds to be registered, but provides for one class of instruments only, namely, unconditional assignments; and does not limit the effect of priority of registration to assignments for valuable consideration (b).

Judgment.

A different construction has been put on the English Shipping Acts as to registration, but this arises both from the fact that these Statutes have in view not merely the rights of individuals, as the Acts relating to lands have, but also national objects which any other construction would have defeated; and from the peculiar language adopted by the Legislature to secure these objects. The policy of the Shipping Acts was thus stated by Lord Chancellor Campbell in *The Liverpool Borough Bank v. Turner* (c), in accordance with many previous authorities: "A disclosure of the true and actual owners of every British ship is considered to be of the utmost importance with a view to the commercial privileges which British ships are entitled to, and, still more, with a view to the proper use and the honour of the British flag. The State can only obtain the desired information by the register disclosing the names of the true owners, and by the register being considered by the Statute the only evidence of ownership. To acknowledge the title of a totally different set of owners from that represented in

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(a) Dw. on Sts. 569 et. seq.

(b) See also 22 Vic. (U. C. Consol.) ch. 80, sec. 18, Can. Consol. ch. 22, sec. 16.

(c) 2 DeG. F. & J. 508, Ib. 1 H. & M. 159.

the register would, I think, be at variance with the policy, and a violation of the enactments of the Legislature.” In connection with this policy the following strong language is used in the Act (a): “That when and so often as the property in any ship or vessel, or any part thereof, belonging to any of Her Majesty’s subjects, shall, after registry thereof, be sold to any other or others of Her Majesty’s subjects, the same shall be transferred by bill of sale, or other instrument in writing, containing a recital of the certificate of such ship or vessel, or the principal contents thereof; otherwise such transfer shall not be valid or effectual for any purpose whatever either in law or in equity;” (b) and (c) “That no bill of sale or other instrument in writing shall be valid and effectual to pass the property in any ship or vessel, or in any share thereof, or for any other purpose, until such bill of sale or other instrument in writing shall have been produced to the collector, &c., nor until such collector, &c., shall have entered in the book,” &c. The other Statutes on the subject contain clauses as distinct as these.

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On the whole, therefore, I take it to be clear that the patentee took, subject to the plaintiffs’ rights of which he had notice; and this appears from the evidence to have been the view of the Commissioner in allowing the patent to issue to *Lister*.

The decree will direct the plaintiffs to pay *Clarke* and *Daintry* the amount paid by *Lister* to the Government with interest, less the plaintiff’s costs of this suit; and on such payment the plaintiffs will be entitled to a reconveyance of the property free, &c., or to a vesting order. If the costs exceed the amount which the plaintiffs are liable to pay, the defendants are to pay the difference.

(a) See 8 & 9 Vic. ch. 89, sec 34.

(b) Vide *Hughes v. Morris*, 2 D. M. & G. 349; *McCalmont v. Rankin* 1b. 403.

(c) Sec. 37.

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**THE TRUST AND LOAN COMPANY V. CUTHBERT.**

*Sheriff's sale—Priority of writs.*

Two executions against lands were in the hands of the Sheriff, and the Sheriff had advertised a sale under the first writ. On the morning of the intended sale the Sheriff was directed not to proceed with it, and accordingly the sale did not take place :

*Held*, that the first execution was thereby postponed to the second : the direction to the Sheriff being peremptory, although it was given for no fraudulent purpose, and although in giving it there was no intention of abandoning the seizure.

Hearing at Woodstock at the spring sittings of 1867, before Vice-Chancellor *Mowat*.

The plaintiffs did not appear.

Mr. *J. A. Boyd*, for the defendant *Cuthbert*.

Mr. *Fletcher* for the defendant *Duncan*.

**Judgment.**

**MOWAT, V. C.**—This is an interpleader suit relating to a sum of money which the plaintiffs have paid into Court, and the question is, which of the defendants *Cuthbert* and *Duncan* is entitled to it.

The plaintiffs had a mortgage on certain land in Oxford belonging to one *Garry V. DeLong*, to secure \$1,000 and interest, and the mortgage contained a power of sale. Afterwards, namely on the 30th of November, 1864, *Buchanan & Co.* delivered an execution against the lands of the mortgagor to the Sheriff of Oxford, indorsed to levy \$1,582 45. Shortly afterwards, namely on the 13th of December, 1864, the mortgagor executed a second mortgage to the defendant *Duncan*, to secure \$1,400 ; and on the 6th of February following, the defendant *Cuthbert* delivered to the Sheriff a *fi. fa.* against lands. I do not find this writ among the papers given me, but it was admitted that more than the

amount in Court is due upon it. The Sheriff seized the debtor's equity of redemption subject to the Trust and Loan Company's mortgage, and advertised a sale thereof under *Buchanan & Co.*'s writ, for the 27th of March, 1866. Before the sale took place, *Buchanan & Co.*, through Mr. *W. B. Smith*, their managing clerk at Hamilton (whose authority is not disputed), agreed verbally for the sale of their judgment to the defendant *Duncan*, for \$1,700, being somewhat less than was due on it, but the sale was not to go into effect until payment of the money; and a messenger, Mr. *Robert Smith*, was sent to Woodstock to receive the money from Mr. *Duncan* there, if he should be prepared to pay it, and otherwise to attend the sale and bid to the amount of *Buchanan & Co.*'s execution. A letter addressed to the Sheriff was delivered by Mr. *W. B. Smith* to the messenger with instructions to deliver it to the Sheriff if Mr. *Duncan* paid the money. That letter was in these words:

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"HAMILTON, 26th March, 1866.

"DEAR SIR,—

"Please stay proceedings in suit *Buchanan et al. v. Garry V. DeLong*, as the matter has been arranged.

"BUCHANAN, HOPE & Co.

"Per W. B. SMITH."

On arriving at Woodstock, on the morning of the 27th, the day of the sale, Mr. *Robert Smith* had an interview with Mr. *Duncan* and his attorney at the office of the latter; and they came to an understanding. They then proceeded to the Sheriff's office, and told the Sheriff that Mr. *Duncan* had purchased the judgment. A discussion then took place as to the Sheriff's fees. *Duncan's* attorney asked the Sheriff whether he would insist on his poundage if the sale went on. The Sheriff replied that he would. The attorney said "Then we will not go on with the sale." *Smith* appears then to have

1867. handed the Sheriff the letter of which he was the bearer, though *Duncan* had not actually paid him the money agreed upon: he had promised to pay it on their returning to the attorney's office, and with this promise *Smith* was satisfied. All left the Sheriff's office, but had not left the building when *Smith*, not feeling quite sure that the Sheriff had distinctly understood that the sale was not to go on, returned into his office to give him an express direction to that effect. The Sheriff then, if not before, said he would go on with the sale unless his poundage and other fees were paid. *Smith* immediately reported this to *Duncan* and the attorney; and all three thereupon returned to the Sheriff's office, when the amount demanded by the Sheriff was paid under protest.

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Judgment. The whole difficulty appears to have arisen from the natural desire of *Duncan* and his attorney to avoid paying these fees. If the sale went on, *Duncan* might have secured himself by bidding up to an amount sufficient to protect himself, and he could not expect to accomplish more at a future sale. But he would in that case have had to pay the Sheriff's fees. He hoped so to manage matters as to avoid this unpleasant necessity, and he therefore stopped the sale, and paid the Sheriff's fees under protest. The result has been the present suit.

Agreeably to his instructions, the Sheriff did not proceed with the sale. A number of persons were in attendance at the time and place advertised, and amongst others the defendant *Cuthbert*, who is described as a wealthy man, and he had told the Sheriff he meant to buy. He was not a party to stopping the sale.

*Duncan* on the same day paid the sum agreed upon for an assignment of the judgment; and a few days afterwards an assignment was executed. The Sheriff on the same day, as he thinks, certainly within a very few days, sent the *fi. fa.* to Messrs. *Daniels & Barry*

(Mr. *Daniel* being named thereon as the plaintiff's attorney) with the following return indorsed and signed: "Settled with the plaintiffs as per their instructions dated March 26, 1866." The writ was immediately sent back to the Sheriff with notice that the return was wrong. Some further correspondence took place, and the writ has been retained by the Sheriff, the return being left uncanceled, and no further proceedings having taken place in respect thereof.

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On the 10th of May, 1866, the Trust and Loan Company sold the property to the defendant *Duncan*, under their power of sale, for a sum sufficient to pay the two mortgages, and leaving a balance of \$125, which is the only sum now in question.

It was contended on the part of *Cuthbert*, that the execution of *Buchanan & Co.* must be deemed to have been paid and satisfied by the transactions I have detailed. But payment in this sense was certainly not what the parties intended, and I do not think it was the effect of what they did. On this point I expressed my opinion fully at the close of the argument.

Judgment.

It was further contended that, however the fact may be, the Sheriff's return is an estoppel as between the parties now litigating. No authority to shew this was cited; and the authorities I have myself seen appear to be the other way. I refer to *Standish v. Ross* (a), and the cases there cited.

It was contended, finally, that by stopping the sale the priority of *Buchanan & Co.*'s execution was lost; and I have, with considerable reluctance, come to the conclusion that the authorities support this contention.

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(a) 3 Exch. 527.

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Judgment.

It is to be observed that there was an absolute stay of the sale by the authority of the plaintiffs, with the consent and approbation of *Duncan*. The Sheriff was not asked to postpone the sale; he was required not to proceed with it; and was told that *Duncan* and his advisers had not made up their minds whether they would ultimately proceed at law or in this Court. Still there was certainly no intention on *Duncan's* part to abandon the seisure of the property. The Sheriff admits that in the conversations which took place on the day of the sale, Mr. *Duncan's* attorney told him that he might sell if he could make the amount of the judgment of *Buchanan & Co.*, and the mortgage of Mr. *Duncan*; and *Duncan's* reason for stopping the sale was, no doubt, the hope of selling the property at a future day to better advantage, either through the Sheriff or in this Court as might be decided upon. Several witnesses swear that the attorney, when he paid the poundage, told the Sheriff to keep the writ on foot for *Duncan's* benefit; but the Sheriff did not observe, or does not recollect, this direction, and is under the impression that the witnesses are confounding what they meant to do, and had talked together of doing before going to his office, with what actually took place there. But the point does not seem material, for whether he was directed to keep the writ on foot or not, he was certainly forbidden to sell the property until he should get further instructions, unless, indeed, he could get for it a sufficient sum to cover *Buchanan & Co.'s* execution and *Duncan's* mortgage; and this all assumed he could not get. The direction given to the Sheriff was peremptory. The Sheriff was not at liberty to disregard it, and would have been liable to an action if he had ventured to do so. The execution of the writ was thus, confessedly, taken out of the Sheriff's control; the writ, in the language of the cases, had ceased for the time to be in his hands for execution.

Now, in *Kempland v. Macaulay* (a) it was held by Lord *Kenyon* that where the plaintiff's attorney instructed the Sheriff's officer "not to levy under the writ till a future day," and another writ came into the office before the day named, the latter writ had the priority.

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In *Pringle v. Isaac* (b) it was held by the Court of Exchequer that a direction to the Sheriff not to levy unless another execution came in, had the same effect. *Foster v. Smith*, in the Court of Queen's Bench in this country (c), is to the same effect.

In *Hunt v. Hooper* (d) the direction was, not to execute the writ until further orders; and the decision was the same. *The Bank of Montreal v. Munro* (e) is an authority on the same point.

In these cases the order forbade a seizure. In *Lovick v. Crowder* (f), and in *Kirwan v. Jennings* (g), it was the sale which was forbidden; the seizure had taken place before the second writ came into the Sheriff's hands; and there was no intention of abandoning the seizure, but only of postponing the sale. *Kirwan v. Jennings* was in the Irish Exchequer Chamber, and the distinction between staying a seizure and staying a sale after seizure is referred to, but only to be repudiated. "No matter (said one of the learned Judges) what the difference, the principle is the same; for the execution, to have operation, must be delivered, not for the purpose of seizure alone, but for seizure and levy absolutely."

Judgment.

It is clear there was no fraudulent purpose in the staying of the sale. But it was expressly held in *Hunt*

(a) Peake N.P.C. 95; see also *Smallcomb v. Buckingham*, 1 Salk. 320.

(b) 11 Pri. 445. (c) 13 U. C. Q. B. 243. (d) 12 M. & W. 604.

(e) 23 U. C. Q. B. 415; see also *Davis v. Jarvis*, 2 U. C. C. P. 161.

(f) 8 B. & C. 133.

(g) 3 Ir. C. L. 48.

1867. *v. Hooper (a)*, and other cases, that the absence of a fraudulent intent does not preserve the priority of the first execution. In that case the first execution was for Trust and Loan Co. *v.* Cuthbert. £518 19s. 8d., and the goods yielded only £27 5s. 11d.; and, though there was no pretence of fraud, the direction to stay until further orders was held to postpone the creditor on whose behalf this direction was given.

The mere omission of the Sheriff to sell on the 29th of March, or to postpone the sale, would not of itself have postponed *Buchanan & Co.*'s execution (*b*), but the order to the Sheriff not to sell, appears clearly to have that effect.

Judgment. The result is, that the money in Court must be paid out to the defendant *Cuthbert*, and that his costs must be paid by the defendant *Duncan*.

I do not see why the bill was not filed by the plaintiffs in the County Court, the amount, \$125, being within the jurisdiction of that Court (*c*). *Cuthbert*'s action against the Company, which the bill was filed to restrain, was brought in the County Court of the County of Oxford; and both defendants appear to reside in that County. But the defendants not having taken the objection by their answers, and having elected to go down to a hearing in this Court, the plaintiffs should not be charged with the extra costs which a suit in this Court may have occasioned the defendants, though it may be proper that the plaintiffs should not receive costs.

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(a) 12 M. & W. 664.

(b) *Hall v. Goslee*, 15 U. C. C. P. 101.

(c) U. C. Consol. ch. 15, sec. 34, sub-sec. 8.

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## ROBSON V. WRIDE.

*Decree—Undertaking—Money paid out of Court in mistake.*

W. entered into a contract for the purchase of property, the price being payable by instalments; and there being a mortgage on the property to the Trust and Loan Company which was not due, the vendor was to give the vendee W. a bond of indemnity in respect of the mortgage. A decree was made at the suit of the vendor for specific performance, on the undertaking of the plaintiff, recited in the decree, to procure a release or discharge of the mortgage; and the over-due instalments were ordered to be paid into the Bank subject to the further order of the Court. On a question subsequently arising as to the effect of this undertaking, it was *held* that the performance of the undertaking was not a condition precedent to the paying in of the money, but was a condition precedent to its being paid out.

A sum of money having been paid in under the decree, an application was made by the plaintiff to have it paid out, which the Court declined to order without an unconditional execution of a discharge by the Company. A deed sealed by the Company, but which had never been delivered was then, through some misunderstanding, submitted to the Court as duly executed and delivered, and on the faith of this representation, the money was paid out accordingly. On the facts being subsequently discovered by the defendant, and brought before the Court on petition, the Court ordered the restoration of the money.

The facts of this case will be found in the report of the hearing ante Vol. 7, page 598, under the name of *Fisken v. Wride*. For a report of the case at a subsequent stage, see ante vol. 11, page 245. *George Robson* having been appointed trustee in bankruptcy for the original plaintiff *John Fisken*, the suit was revived in the name of *George Robson* on the 18th of December, 1860. Statement.

The present application was by petition of the defendant *Wride*.

The facts set forth in the petition are stated in the judgment.

Mr. *Hodgins*, for the petitioner.

Mr. *Blain*, contra.

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MOWAT, V. C.—The decree on further directions in this case (dated the 23rd of April, 1861) was made on the undertaking by counsel for the plaintiff “to procure a release or discharge of the mortgage in favour of the Trust and Loan Company of the premises in question in this cause embraced with others in the said mortgage; and declared that the agreement mentioned in the pleadings should be specifically performed; directed that the defendant should pay into the Bank to abide the further order of the Court the sums past due under the agreement, and should execute a mortgage for the undue instalments of the purchase money; referred it to the Master to take the necessary accounts, and to settle the conveyance to be executed to the defendant and the mortgage he was to execute; and reserved further directions. In the conveyance settled by the Master under the decree, the Trust and Loan Company was made a party.

Judgment.

I think the proper construction of the undertaking recited in the decree is, that, as soon as the money was paid by the defendant into the Bank, and either before or simultaneously with the execution of the mortgage, the release or discharge from the Trust and Loan Company should be procured.

The Company's mortgage was for £2,500, payable on the 1st of October, 1862, with interest meantime.

Under the decree a sum of \$1,094 65 was paid into Court, being part of a sum of \$1,933 15 made by the Sheriff under executions against the defendant for the arrears. The amount of arrears, with interest, was reported by the Master on the 9th of October, 1861, to be £2,537 14s. 6d.; the instalments not yet due amounting to the further sum of £1,750, for which the mortgage was to be given. In April, 1863, the plaintiff applied to have the money in Court paid out to him. The Court

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Wride.

declined to order the payment unless the Trust and Loan Company should first execute the release of their mortgage, but directed the order to go on the plaintiff's producing to the Registrar evidence of the discharge of that mortgage, and on his delivering the deed from *Robson* to the defendant. The plaintiff had executed before this, but had not delivered to the defendant, the conveyance settled by the Master, and the Company had affixed their seal to it, but had not delivered it in consequence of the defendant's wife not having signed the mortgage which the Master had settled. The Company's Solicitor or his agent was in Court, and had with him this deed when the motion was made; and on the Court requiring an unconditional delivery, he, at the instance of the plaintiff's Solicitor, delivered the deed to the latter for the purpose of the motion, on the undertaking of the latter that the Company should not be prejudiced by this course. This does not accord with the recollection of the facts by the plaintiff's Solicitor, but what took place has already been under judicial investigation in a suit of *The Trust and Loan Company v. Fiskin* for the foreclosure of the original mortgage, and my brother *Spragge* decided, on substantially the same evidence as is now before me, that there was no complete execution of the deed by the Company; that their mortgage was not discharged; and that they were entitled to a decree for the foreclosure thereof. Looking at the evidence before me, I take the same view as my brother did. It was represented, however, to the Court or its officer, through some misunderstanding, that the deed had been absolutely delivered; and it was, confessedly, on the faith of this representation that the order for the money was issued, and the money obtained by the plaintiff.

Judgment.

The non-delivery of the deed having come to the knowledge of the defendant *Wride* at the hearing of the foreclosure suit, he immediately filed a petition in the present suit, claiming, in consequence of the non-fulfil-

1867. ment of the plaintiff's undertaking, and of the inaccurate statement on which the money was got out of Court, that, amongst other things, the plaintiff should be discharged from the contract, and the money collected from him repaid, and other relief.

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Wride.

The inaccuracy of the statement on the faith of which the money was got out of Court, appears to demand that it should be ordered back into Court, but does not form any ground for relief beyond that.

Judgment. In the view I take of the proper construction of the undertaking, the lapse of time does not entitle the defendant to treat the undertaking as no longer availing. The decree does not say that the discharge was to be procured before the money was payable into Court, or before the mortgage should be executed; and the defendant himself acquiesced in proceedings to compel payment, and executed the mortgage, before the conveyance was executed or pretended to have been executed. If the undertaking was thus a condition precedent to the performance of his part of the decree, the defendant may be said to have waived it. But I think it was only a condition precedent to the payment out of the money, and to the execution of the mortgage. If the plaintiff, by the foreclosure of the original mortgage, is now unable, or shall become unable, to comply with his undertaking, the defendant must, I presume, be relieved from his contract on some terms; though on what terms—I am not prepared to say, and I hope that, by some arrangement, the parties to this costly and tedious litigation will render it unnecessary for the Court to consider. On the one hand, the plaintiff should bear in mind the apparent hardship of the bargain which he has been availing himself of his strict right to enforce, and the large sums which the defendant has paid without, I fear, deriving any benefit from the property or the contract; the defendant, on the other hand, should not forget that the Court has decided the contract

proper to be enforced ; that, but for his own default in paying the purchase money agreeably to the contract, there would have been no real difficulty with the Trust and Loan Company ; that he allowed the bill of the Company to foreclose the original mortgage to be taken *pro confesso* against him, as if the Company's foreclosing that mortgage was no injury to him ; and that the whole litigation has been the result of his own unwillingness or inability to keep the bargain he had entered into. These and other considerations may have to be weighed by the Court hereafter, if called on to decide as to the terms on which the defendant is to be relieved from the decree ; but as there had been no foreclosure by the Trust and Loan Company up to the filing of the petition, and as there is no allegation that it is now out of the plaintiff's power to fulfil his undertaking, no relief founded on that supposition has to be considered on the present application.

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It is of great importance to discourage and discountenance on every occasion any looseness or incorrectness in representations made to the Court, and which mislead the Court, particularly in dealing with money under its control. I am quite disposed to assume that the inaccuracy in the present instance was the result of some misapprehension ; but it was a misapprehension which ought not to have occurred, and from which the plaintiff should not be permitted to retain any advantage. I entirely agree with the observation of the Court in *The Trust and Loan Company v. Robson*, that if the matter had been regularly conducted, *Wride's* Solicitor would have received an opportunity of attending, and " would have attended, before the Registrar, or the Clerk in Chambers, to see that the discharge was properly proved, as directed by the Chancellor, or would have received the release itself out of Court from the hands of the plaintiff's solicitor. The money ought not to have been paid out without the one or the other." The deed,

Judgment.

1867. after being exhibited to the officer of the Court for the purpose of getting the order, was returned by the plaintiff's Solicitor to the Solicitor for the Company, without being registered. This proceeding the plaintiff now accounts for by suggesting that the Company, as holder of the new mortgage, was entitled to the custody of the instrument as a deed relating to the mortgaged property.

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But for the proceeding being *ex parte*, the inaccuracy of the representation would probably have been ineffectual, and to overlook it now is, I think, impossible.

The proceedings in the suit of *The Trust and Loan Company v. Robson* were referred to as disentitling the defendant to any relief in this cause; but, after giving my best attention to the argument, I have not been able to adopt it.

**Judgment.** When the money is paid back into Court, the plaintiff will be at liberty to make such application as he may be advised for its repayment to him.

Considering the relief I grant on the petition, and the ground of that relief, I think the plaintiff should pay the costs of the application, though the petition asks more than I grant; such costs to be deducted from the money coming to the plaintiff from the defendant.

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1867.

## THE GORE BANK V. THE ROYAL CANADIAN BANK.

*Bank cheques.*

If a Bank refuse to pay a cheque when they have sufficient funds of the drawer for the purpose, the holder can compel payment in equity. But the circumstance of there being sufficient at the drawer's credit in the Bank Ledger at the time of the cheque being presented, is immaterial, if the ledger did not shew the true state of the account.

The Royal Canadian Bank held a draft payable in Buffalo and accepted by a firm there, and for which they held in security certain flour. On the day before the draft matured, it being suggested by the drawer that the flour had not been sold, the Bank agreed to discount a renewal draft on the same parties and on the same security, and passed the proceeds of the renewal to the credit of the drawer, but neglected to charge him with the original draft. Before the letter from the Bank to their Buffalo correspondents respecting the transaction reached Buffalo, the flour was sold and the original draft paid by the drawees, and they therefore did not accept the renewal:

*Held*, that the drawer was not entitled to demand from the Bank the proceeds of the renewal; and that the holder of his cheque was in no better situation than the drawer.

Hearing at Woodstock, before Vice-Chancellor *Mowat*, in May, 1867.

Mr. *Barrett* for the plaintiff.

Mr. *Fletcher* for the defendants.

MOWAT, V. C.—The parties agreed, when this cause came on to be heard, that it should be disposed of, without further argument, on the affidavits and depositions which were before me some time before on a motion for an injunction; there being no difference between the parties as to the facts, and the substantial controversy being as to the liability which these facts create.

Judgment.

The facts are these. The defendant *Andrew Eaton* had an account with the defendants The Royal Canadian

1867. Bank, at their agency in Woodstock; and in January, 1867, the Bank discounted for *Eaton* a draft for \$680 on Messrs. *Sears & Dow* of Buffalo. This draft was drawn against some flour shipped by *Eaton* to Buffalo to the order of the Bank, and was due on the 5th of March, 1867. On the 4th, *Eaton* called at the Bank agency, and requested the agent to discount a renewal draft on the same parties for the purpose of retiring the draft which would mature on the 5th, the flour it was supposed not having been sold. The agent consented; and thereupon *Eaton* drew for the same amount as before, and delivered the draft to the Bank. The agent, by arrangement with *Eaton*, wrote on the same day to the correspondents of the Bank in Buffalo, enclosing the renewal draft, and directing them to return the overdue bill on the following day without expense, and to transfer the shipping receipt to the renewal. Before this letter was received at Buffalo, the flour had been sold; and *Sears & Dow*, the drawees, had paid the first draft. They therefore did not accept the renewal draft, and it was returned to the Bank at Woodstock by their Buffalo correspondents.

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v.  
Royal Canadian Bank.

Judgment.

I am clear that these circumstances, if there were no others, would not entitle *Eaton* to be paid the proceeds of the renewal; that if he had changed his mind, as to the application of the proceeds of the renewal, before the payment of the original draft by the drawees, he would have had no power to divert the proceeds from the stipulated object; and that what occurred afterwards did not give him a right to receive the proceeds, unless the Bank chose. There was no contract to pay out the proceeds except to meet the maturing draft then held by the same Bank; and in that case the Bank would have the security of the flour and the personal security of *Sears & Dow*. The money not being needed for that purpose, and the flour being gone, and *Sears & Dow* having paid and received the first

draft, the only case for which the parties had contracted did not arise. 1867.

Gore Bank  
v.  
Royal Canadian Bank.

But the Bank on the 4th of March credited *Eaton* in their ledger with the proceeds of the renewal; and, though instructed by *Eaton* to charge him with the other draft, they neglected to do so until the afternoon of the 7th, after the plaintiffs had presented at the Bank a cheque of *Eaton's* for \$761, which, if the proceeds of the renewal were not applicable to the purpose, there was not sufficient at *Eaton's* credit to pay. Do these circumstances affect the liability of the Bank? and are the plaintiffs entitled to insist in equity on payment of the cheque? That is what the plaintiffs claim, and that is the question in the cause.

Now, the plaintiffs cannot claim in this Court any right beyond that which, at the moment of presenting the cheque, the drawer himself would have had. If the Bank had then in their hands \$761 belonging to *Eaton*, and which he was entitled to withdraw, the plaintiffs were assignees of that right, and are entitled to insist in this Court on the money being paid to them, instead of being paid to *Eaton* or to any subsequent assignee of *Eaton*. But if the Bank had not that amount in their hands subject to being withdrawn by *Eaton* at pleasure, the plaintiffs took, by virtue of *Eaton's* cheque, no better or greater right than *Eaton* himself had. And if the entries made in the books of the Bank by their own officers did not shew the true state of the account between that Bank and *Eaton*, these entries do not affect the Bank's liability.

Judgment.

When on the morning of the 7th the plaintiffs presented the cheque which they held, the teller, after looking at the ledger, said it was "all right," but the agent then came up, looked at the entries, and, remembering the true state of the account, said there

1867. must be some mistake, and returned the cheque to the clerk who presented it for the plaintiffs, saying to him, that there were not sufficient funds. The mere remark of the teller that the cheque was "all right," was plainly not sufficient to create a liability which is negatived by the other facts of the case.

Gore Bank  
v.  
Royal Canadian Bank.

Afterwards, and on the same day, *Eaton*, knowing what had taken place in Buffalo, and being informed of the omission of the Bank to charge him on the 4th or 5th with the draft which matured on the 5th, gave the Bank a cheque to cover it; and he entirely concurs with his co-defendants in the position they assume in regard to his account. It is contested by the plaintiffs alone.

The bill must be dismissed with costs.

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### O'CONNOR V. NAUGHTON.

#### *Partnership—Dissolution—False pretences.*

A. B. & C. were partners. Two of them A. & B., before the expiration of the term, induced the third (C.) to agree to a dissolution, a valuation of the assets, and a settlement based on such valuation, under the false impression that A. was the partner who was to retire, and that the business was to be continued by B. & C., while the fact was that the object of A. & B. was to get rid of C., and to carry on the business without him: *Held*, that, by reason of this deceit, the transaction was not binding on C., every partner being entitled to the utmost good faith by his co-partners in effecting a dissolution of the partnership and winding up its affairs, as well as in their previous transactions.

This case came on for the examination of witnesses and hearing, before Vice-Chancellor *Mowat*, at the sittings of the Court held at Guelph, in the spring of 1867.

Mr. *Blake*, Q. C., for the plaintiff.

1867.

Mr. *Strong*, Q. C., and Mr. *Palmer*, for the defendants.

O'Connor  
v.  
Naughton.

MOWAT, V. C.—On the 8th of September, 1865, the defendants *Edward Naughton* and *Francis Gaughan* entered into partnership with the plaintiff as produce dealers for a year; the partnership to be continued for two years, if the plaintiff should so elect. By mutual arrangement *Gaughan* was to keep the books and conduct the correspondence. The other parties occasionally made entries in the books; and a trial balance seems to have been prepared every month, for the information of all. Most, though not all, of the capital was provided by the defendants.

On the 10th March, 1866, *Gaughan* drew, and the plaintiff signed, the following receipt: “Received from *Naughton* and *Gaughan*, the sum of four hundred and fifty-three dollars, in full of all claims to date. The books to be examined at my desire at any time, which Mr. *Naughton* hereby agrees to, and any errors to be rectified by him, the partnership being this day dissolved. WM. O’CONNOR.”

Judgment.

The defendants did not sign this paper, and do not appear to have signed any corresponding document.

The plaintiff prays that the accounts of the partnership transactions may be taken notwithstanding this paper, and the transaction to which it refers; that the partnership business may be wound up under the decree of this Court, and all proper directions for this purpose given. The defendants rely on the receipt as a settlement of all the plaintiff’s claims in respect of the partnership property and business. The plaintiff, on the other hand, contends that this was not the meaning of the receipt, or the view with which it was signed.

1867. The facts, I think, were that the defendants, as  
O'Connor, v. Naughton. early probably as January, 1866, determined to get rid  
of the plaintiff as a partner, if they could; that, with this  
view, they pretended to the plaintiff that *Gaughan* wished  
to retire from the business and to return to Ireland; that  
the plaintiff offered no opposition to his retiring; that  
*Naughton* led the plaintiff to suppose that they two would,  
after *Gaughan's* retirement, carry on the business as  
theretofore; that at *Gaughan's* suggestion the 10th of  
March was appointed for a settlement with a view to his  
retirement; that there was a private agreement be-  
tween the defendants at this time that on getting the  
plaintiff out of the concern they would continue it on  
their own account; that this agreement was concealed  
from the plaintiff; that the partnership assets were  
valued on that day by the defendants for the purpose of  
the settlement; that the plaintiff was present, but took  
no active part in the valuation, or in the investigation  
Judgment. of the account which *Gaughan* prepared shewing the  
shares of the respective parties in the concern—the  
plaintiff believing that the interests of himself and  
*Naughton* were identical, and therefore adopting what-  
ever *Naughton* agreed to; that the sum named in the  
receipt was the amount which by this account appeared  
to be the plaintiff's share of the capital and profits up  
to the date of the receipt; that *Gaughan* thereupon  
drew a cheque for the amount on the bank account of  
the partnership (which had been kept in the names of  
the defendants), and handed this cheque to the plaintiff  
with the receipt; that the plaintiff took the cheque,  
and signed the receipt; that up to this time there had  
been no proposal that the plaintiff should sell out to  
the defendants, and no such transaction had been  
contemplated by the plaintiff; that the plaintiff was  
then asked to sign a notice of the dissolution for  
publication; that, now probably suspecting something  
wrong, he declined signing the notice until he should  
consult an attorney; that on Monday, the 12th, he

declined absolutely, and claimed to be still interested in the business. The defendants, however, insisted that the partnership was at an end, and have since, against the plaintiff's wish, carried on the business by themselves, excluding the plaintiff from any participation in it.

1867.  
O'Connor  
v.  
Naughton.

Some of the circumstances I have narrated appear only from the examination of the plaintiff, though the most important of them are either undisputed or satisfactorily established by independent evidence. The defendants have put the examination in evidence, as it contained admissions deemed important to their defence; and such of the particulars I have mentioned as the examination alone informs us of, are so entirely in accordance with the other evidence, and so strongly corroborated by the undisputed facts, that I have no hesitation in giving credence to the examination as a whole.

The bill was filed on the 12th, of September, 1866; and it is not pretended that the plaintiff had in the interval abandoned his claim, or that the lapse of time is any bar to it. Judgment

The defendants by their original answer did not set up the receipt as a dissolution of the partnership and final settlement of its affairs, but, on the contrary, stated that the defendants were willing to have the affairs of the partnership wound up under the direction of this Court; submitting, however, that the plaintiff had filed the bill needlessly, and without giving the defendants an opportunity of correcting any supposed mistake or error, which, they said, they had always been ready and willing to do. But the answer to the amended bill relies on the receipt as a bar to all relief, except for errors in the books (a); and insists that, as

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(a) Vide *Coleman v. Mellersh*, 2 McN. & G. 309.

1867. no specific errors are charged in the bill, there can be no relief even for errors (a); and these points were strongly urged in their behalf at the bar.

O'Connor  
v.  
Naughton.

But the plaintiff's assent to the transaction of the 10th of March was clearly obtained by false pretences; and by creating, and leaving the plaintiff under, false impressions, without which I have no doubt that he would not have given his assent; and it is clear that the defendants so believed. The learned counsel for the defendants contended that they were under no obligation to communicate to the plaintiff their private agreement. They did more than not communicate this agreement—they created false impressions on the plaintiff's mind, and took advantage of false impressions they knew he was under. But I do not assent to the doctrine that the defendants were at liberty to conceal even what they confessedly withheld: the reverse is the settled doctrine of equity.

Judgment.

By the rules of this Court, the utmost good faith is required from every partner: his conduct must bear to be tried (as, happily, learned equity Judges have long maintained) by the very highest standard of justice and honor; and this rule has been held to apply to the conduct of partners towards one another in effecting a dissolution of the partnership (b), and in winding up and settling its affairs, as well as in all the proceedings of the partners with a view to the formation of the partnership, or during its progress. Every partner is bound to disclose *uberrimâ fide* every fact which it can be material for his co-partner to know, or which may enable him to exercise a sound discretion as to the course he ought to pursue (c). This duty the defendants grossly violated, and they have no right to retain the fruit of their misconduct.

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(a) Johnson v. Curtis, 3 B.C.C. 266; Sim v. Sim, 11 Ir. Ch. 310.

(b) Blisset v. Daniel, 10 H. 493.

(c) Clement v. Hall, 2 DeG. & J. 188.

I am therefore of opinion that the transaction of the 10th March was not binding on the plaintiff; and that the defendants are not entitled to call on the plaintiff for proof of errors in the books or undervaluation of assets, as a condition of relief. This view relieves me from the necessity of considering the effect, under the present practice of the Court, of not stating in the bill the specific errors complained of.

1867.  
O'Connor  
v.  
Naughton.

The usual partnership accounts will be taken, and the usual directions will be given as to the sale of the partnership property and winding up its affairs. The plaintiff does not seek an account of profits subsequent to the 10th March, 1866, and I presume that the parties can agree as to the modification of the usual decree, which the abandonment of the plaintiff's right to these subsequent profits may require.

The plaintiff will have the costs up to the hearing : Judgment.  
reserve further directions and subsequent costs.

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CAYLEY V. HODGSON.

*Mortgage—Equity of redemption in dispute.*

Where there is a dispute as to the ownership of the equity of redemption, the decree in a foreclosure suit should usually contain a direction to the Master to inquire as to the ownership before a day is appointed for payment of the mortgage money.

This was a suit of foreclosure by first mortgagees. There were several defendants to the bill, and the bill charged that the plaintiffs could not state which of the defendants were, under the circumstances set forth, entitled to the equity of redemption. The plaintiffs claimed to be entitled to a decree naming one day for all to redeem, and in default foreclosing all,

Statement.

1867 leaving the defendants to procure a decision in the  
 Cayley  
 v.  
 Hodgson. meantime, if they could, as to which of them was the  
 owner of the equity of redemption. The defendant  
*Madden* asked a reference, first, to ascertain who was  
 entitled to the equity of redemption.

Mr. *Cattanach*, for the plaintiff.

Mr. *Stephens*, for the defendant *Madden*.

MOWAT, V. C.—I cannot find in the books of precedents or in the reports, any example of such a decree as the plaintiffs desire.

Judgment. *Smith v. Baker* (a) was a suit for foreclosure. The mortgagor had executed a subsequent conveyance of his estate to trustees for creditors, and there was a controversy between him and the grantees, all of whom were defendants, as to the validity of this conveyance. The course which Lord *Cottenham* took on the hearing was, to declare the plaintiff entitled to a decree for foreclosure, and to refer to the Master to inquire whether the defendants, the grantees named in the deed, had any and what interest under it in the mortgaged premises. This case appears to be quite in point.

It is the ordinary practice where there are several incumbrancers, for the Master to inquire as to their priorities, and after these are ascertained each incumbrancer usually gets a separate day to redeem. If the just rights of a first mortgagee are not interfered with by such a decree in case of a number of persons who are, or claim to be, incumbrancers, I do not see how his rights can justly be said to be interfered with by a like decree in case of a number of persons claiming respectively to be absolute owners, of the equity of redemption.

My brother *Spragge* stated in *Rumsey v. Thompson* 1867. (a) that the point was considered in *Buckland v. Rose* (b), and that he should feel bound to follow what was done in that case whenever the point again arose. Now I find from the Registrar's book that in *Buckland v. Rose* the Court disposed of the controversy between the rival claimants to the equity of redemption before appointing a day for the redemption of the plaintiff's mortgage—as indeed the judgment in *Rumsey v. Thompson* implies. My brother made a different decree in the case before him, but that was because of the special circumstances he found in the case, and which he observed upon at length; amongst them being the facts, that the one defendant had *primâ facie* the right; and that the other, who claimed it, had, from the nature of the case he set up, an opportunity of establishing the claim before the hearing, as the plaintiff was mixed up with it, and he had failed so to establish it; so that, in the judgment of the learned Vice Chancellor, it was matter of discretion with the Court whether or not to allow the claimant a further opportunity: my brother thought this indulgence ought not to be granted at the expense of further delay to the mortgagee. Ordinarily, the question is between co-defendants only, and they have not an opportunity of litigating the question by evidence at the hearing.

Cayley  
v.  
Hodgson.

Judgment.

A decree in the form desired by the plaintiffs might amount to a forfeiture of the equity, in favour of the mortgagee, for it might practically, by means of a false claim on the part of some other person, put it out of the power of the person really entitled, to make use of the property, by mortgage or otherwise, in raising money towards paying off the first mortgage; and the just rights of the mortgagor, or owner of the equity of redemption, have always been as anxiously protected in Courts of equity as the just rights of the mortgagee.

(a) 8 Gr. 375.

(b) Reported 7 Gr. 440, but not on this point.

1867.

  
 Cavley  
 v.  
 Hodgson.

*Buckland v. Rose, Rumsey v. Thompson, and Smith v. Baker*, are all against the plaintiff's contention as applicable to a case like the present; and there is nothing that I can find of either direct authority, or analogy, or recognized principle, in its favour.

I think the decree should refer it to the Master to inquire who is entitled to the equity of redemption, and should otherwise be in the usual form of foreclosure decrees.

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### WHATELEY V. WHATELEY.

*Will—After-acquired real estate.*

A devise of all a testator's real estate passes all he owns at the time of his death.

This was a partition suit relating to property acquired by the testator after he had made his will; and the only question argued was, as to whether the will of the testator *John Clements Whateley*, dated 13th September, 1859, was so expressed as to pass real estate acquired after making it.

Mr. *F. Osler* for the plaintiff.

Mr. *Downey* for the infant defendants.

Judgment.

MOWAT, V. C.—The words of the will are these: "I give all my real and personal estate to my executors and trustees for the purposes of this my will." The Statute (*a*) enacts that when a will "contains a devise, in any form of words, of all such real estate as the testator shall die seised or pos-

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(a) Consol. U. C. ch. 82, sec. 11, p. 831.

1867.

Whately  
v.  
Whately.

sessed of," it shall be valid and effectual to pass subsequently acquired property; and I see no sufficient reason why such a devise as this will contains should not be held a sufficient compliance with this provision. A gift of all a man's personal estate passes after-acquired personal estate; and this is not only the legal construction, but it is undoubtedly the real intention of a testator who makes a will in that form. Before the Statute, the law did not permit a devise of real property not owned by the testator at the time of making the will; and the object of the enactment was to remove this disability. When a man devises all his real estate, his purpose is to devise all he may own at the time of his death, just as much as when he bequeathes all his personal estate; and it was not because such language as this will contains was not thought sufficient to shew an intention to devise after-acquired property, that after-acquired land did not pass, but because no form of words would pass real estate afterwards acquired. I think that a devise in this form shews an intent to pass all the testator should have at his death, and that all the Statute demands is a devise in any form of words which shews such an intent. To require the will to contain an express reference to after-acquired property, in the case of real estate, would serve no good purpose—would create an unnecessary distinction between the words necessary to pass after-acquired personal estate and after-acquired real estate—and would never further, but often frustrate, the real wish of the testator.

Judgment.

I was surprised to find that there is no reported decision at law on the point, and I have not been able to learn that there has been any such decision unreported. It is charged in the bill, and was rather assumed at the bar on the part of the plaintiff than argued, that the property did not pass; but I am glad, on general grounds, to find that nothing has occurred in any Court rendering it necessary for me to affirm that view.

1867. The decree will contain a declaration that the property in question did pass under the will. *Edward Whateley* and *George Whateley* are both plaintiffs and defendants. This is wrong, and their names in one capacity or the other must be struck out. I think it better to strike them out as plaintiffs. The decree otherwise will be in the usual form.

Whateley  
v.  
Whateley.

### HERON V. SWISHER.

#### *Practice—Injunction—Service of Bill.*

Where an *ex parte* injunction is granted before the bill is served, an office copy of the bill should be served with the injunction, or as soon as possible afterwards.

Where an *ex parte* injunction was served 24th December, and the bill was not served up to the 13th of May following, the injunction was dissolved for the neglect to serve.

An injunction while it stands should be obeyed; and where, after twelve weeks had elapsed from the service of the injunction without the bill being served, the defendant treated the injunction as gone, the Court, while refusing a motion to commit for breach of the injunction, refused the defendant his costs of resisting the application.

#### Statement.

Two motions came on to be heard, one by the plaintiff to commit the defendant for breach of an *ex parte* injunction; the other by the defendant to dissolve the injunction in consequence of the non-service of the bill, and on other grounds.

Mr. *Stayner*, for the plaintiff.

Mr. *Spencer*, contra.

*Patrick v Harrison (a), Attorney General v. Nichol (b), Chuck v. Cremer (c), Pearce v. Gray (d), Blake v.*

(a) 3 B. & C. C. 476.

(c) 2 Ph. 113.

(b) 16 Ves. 336.

(d) 4 Beav. 127.

*Blake* (a), General Orders, June, 1853, No. 7: Section 3 of Order 9, and *Smith's* Ch. Prac. 233, were referred to. 1867.

Heron  
v.  
Swisher.

MOWAT, V. C.—Where an *ex parte* injunction, is granted I think that an office copy of the bill should, as a general rule, be served with the injunction (b). But I cannot say that it is essential in all cases, or that the omission is necessarily a fatal irregularity; for a defendant who is aware of an injunction having been issued, is bound to obey it before it is served: and it would be impossible to hold that, while knowledge obtained in any other way before service of the injunction is binding, service of the injunction itself is necessarily unavailing without service of the office copy bill. A case of such emergency may occur that delay until office copies of the bill are ready to be served with the injunction may enable defendants to accomplish the very object which the injunction is obtained to prevent. But as an injunction, to be of force, must be served with all diligence though the defendant is aware of its having been granted (c), so I think it must be held that there should be no unnecessary delay in serving the bill, if it is not served with the injunction or previously. Here the injunction was served on the 24th of December last, and the bill has not yet been served (13th May, 1867); nor has there been any attempt to serve it, or any difficulty in effecting the service. Judgment.

It is said that the plaintiff's case for an injunction (that being the sole object of the bill) was too clear for controversy, and that his Solicitor refrained from serving the bill in order to avoid costs. On a motion of this kind I cannot recognise the opinion of the plaintiff or his Solicitor on such a point as this a sufficient excuse for

(a) 7 Beav. 514.

(b) General Order of June, 1853, No. 9, sec. 3, *Patrick v. Harrison*, 3 B. C. C. 476, 6 ed. Belt. note. *Attorney General v. Nichol*, 16 Ves. 338.

(c) *James v. Downs*, 18 Ves. 522.

1867. not serving the bill—nothing that I have found in the books would warrant my doing so.

Heron  
v.  
Swisher.

The General Order provides that service may be allowed by a Judge after twelve weeks from the filing of the bill, “upon its being made to appear to his satisfaction that due diligence has been used in effecting such service.” The learned counsel for the plaintiff said that, by a liberal construction of this order, the service after twelve weeks has been allowed on a reasonable excuse of any kind being shewn for the lapse of time. I decide nothing now as to that point, but the bill not having been served yet, notwithstanding the lapse of twenty weeks, I am of opinion that whether service, if effected now, would be allowed or not on an application for that purpose, the non-service hitherto must be treated as an irregularity for the purposes of the present motions.

**Judgment.** The defendant obeyed the writ until after the expiration of twelve weeks, and then, not having been served with the bill, proceeded, under advice (as he swears), to remove the house which the injunction had forbidden his interfering with; but I do not think he was rightly advised in taking that course. I think he should have moved to dismiss the bill or to dissolve the injunction, before holding himself free from the restraint the injunction imposed (a); and having, without the order of the Court, taken upon himself to disobey the writ, though I refuse the motion to commit, I do so without costs, following *Notter v. Smith* (b).

The motion to dissolve the injunction must be granted.

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(a) *Chuck v. Cremer*, 2 Ph. 113.

(b) 1 Chamb. Rep. 21.

1867.

THE ATTORNEY GENERAL V. THE TORONTO STREET  
RAILWAY COMPANY.

*Information—Form of*

An information in the name of the Attorney General not signed by him, but on which was indorsed a fiat "Let the within information be filed," signed by the Solicitor General: *Held*, irregular.

This was a motion by

Mr. *S. Blake* for the defendants for an order to remove from the files of the Court the information filed in this cause, for irregularity.

Mr. *G. M. Rae* contra.

*Attorney General v. Fellows* (a), *Attorney General v. Wright* (b), *Rex v. Wilkes* (c) *Attorney General v. The Iron Mongers Co.* (d) *Ex parte Skinner* (e), *The Corporation of Ludlow v. Greenhouse* (f), *Smith's Chan. Prac.* 289, *Grant's Chan. Prac.* Vol 1, p. 74, *Story's Equity Pleading* S. 69, *Daniel's Chan. Prac.* pp. 1. 7. 364, *Mitford's Pleading* pl. 22, *Stephens' Blackstone* Vol. 1. p. 195, were referred to by counsel.

MOWAT, V. C.—This is an information in the name Judgment.  
of the Attorney General, but not signed by him or any one for him. There is a fiat indorsed in the following words: "Let the within information be filed, *James Cockburn*, Solicitor General, U. C.;" and this, it is contended, is a sufficient signing. This fiat is quite a novelty to me, and no example of it was cited to me from the books. I know not whether it was adopted from a supposed analogy to the fiat—Let right be done

(a) 1 J. & W. 254.

(c) 4 Burr. 2537.

(e) 2 Mer. 453.

(b) 3 Beav. 447.

(d) 2 M. & K. 576.

(f) 1 Blight's N. S. 17.

1867. —“*Soit droit fait al partie*”—on a petition of right.

Attorney  
General  
v.  
Toronto St  
Railway Co.

But such a petition is addressed to the Queen herself, and the fiat is subscribed by the Queen: a fiat by the Solicitor General, requiring this Court to receive and file an unsigned information, is entirely without precedent or authority. If it was indorsed merely as a substitute for signing the information, there must, I suppose, have been some reason for departing from the simpler course demanded by the practice, and the fiat may have been considered to imply something different from and less than signing the information: I cannot assume that it meant the same thing.

Judgment.

But if it did, what then? Every bill needs the authority of the plaintiff; but the practice requires the sanction of the Attorney General to an information to be manifested in a particular way. What right have I to say that any other way will do as well? that a memorandum in the form of a fiat, signed by the Solicitor General and indorsed on the information, but forming no part of it, and not indorsed on the office copy served, will do as well as the only method hitherto in use? I think I must hold such a course to be an unnecessary and unauthorized departure from the established practice of the Court, and therefore irregular.


Affidavits are filed shewing that the Attorney General was absent from the Province when the information was submitted for his sanction; and the question was argued on the motion, whether in such a case an information in the name of the Attorney General, and signed by the Solicitor General, was the proper course (a); but on this point it is not necessary to say anything.

*Attorney General v. Fellows* (b) is an express authority that the want of the Attorney General's signature

(a) Vide *Exp. Skinner*, 2 Mer. 453.

(b) 1 J. & W. 254.

even to an amended information, where he had duly signed the original information, is a sufficient ground for taking the amended information off the file with costs. That must, therefore, be my order on the present application.

1867.  
  
 Attorney  
 General  
 v.  
 Toronto St.  
 Railway Co.

## ONTARIO V. WINNAKER.

### *Mortgage—Costs.*

A mortgage was vested in trustees. One of them brought an action at law on the mortgage as plaintiffs' attorney. A bill was afterwards filed by another solicitor to foreclose the mortgage: *Held*, that the plaintiffs were not entitled to the costs at law in addition to those in equity.

This was an appeal from the report of the Master at Kingston, disallowing to the plaintiffs costs incurred in an action at law on the mortgage in question in the cause.

Mr. *Edgar*, for the appeal.

The defendant did not appear.

MOWAT, V. C.—This is an appeal from a decision of the Master at Kingston, disallowing the costs of an action of covenant on the mortgage which this suit is brought to foreclose. Judgment.

By the 7th General Order of the 6th of February, 1858, it is provided that, "where a mortgagee has proceeded at law upon his security, he shall not be entitled to his costs in equity, unless the Court, under the circumstances, shall see fit to order otherwise." The plaintiffs here have been allowed their costs in equity, the defendants not objecting; and these costs exceed the costs at law which this appeal is brought to obtain. If the plaintiffs are allowed the costs at law, they cannot have the costs in equity.

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Ontario  
v.  
Winnaker.

The plaintiffs are the Incorporated Synod of the Diocese of Ontario; and the mortgage was vested in trustees, at the time of the action at law, one of whom was the attorney in the action. His costs have not been paid, but the plaintiffs claim to have them allowed; and it is said that the Master disallowed them on the ground of the attorney being one of the trustees—which, it was argued, was contrary to the case of *Cradock v. Piper* (a) before Lord *Cottenham*. His Lordship in that case proceeded on a distinction between, on the one hand, costs incurred by a trustee as solicitor or attorney for himself and others in a suit; and, on the other hand, professional charges by a trustee acting as solicitor or attorney for himself alone either in a suit or out of Court, or acting for himself and others in a suit; and held that the former were allowable, though not the latter. The distinction does not seem very satisfactory (b). It has been disapproved of by subsequent Judges (c), and is perhaps only maintainable now where the costs incurred by the trustee as solicitor for himself and others jointly, are costs of defending a suit (d).

Judgment.

Appeal dismissed!

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(a) 1 McN & G. 668.

(b) Ib. 677.

(c) *Manson v. Baillie* 2 McQueen 80, 82, 91.

(d) *Broughton v. Broughton*, 5 D. M. & G. 164.

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## MITCHELL V. RICHEY.

*Infants—Securing moneys of—Trustees.*

The rule is that moneys belonging to infants is not ordered in equity to be paid to his guardian, whether appointed by the Surrogate Court or otherwise, but is secured for the benefit of the infants under the authority of this Court :

But the rule may not apply where the amount is small and is required for the maintenance, education or other immediate use of the infants, or where some other special circumstances exist justifying an exception to the general rule.

When one of the trustees was dead and another was removed for misconduct, the remaining trustee was held to be entitled to be discharged from the trust.

This case came on before Vice-Chancellor *Mowat*, for further directions and costs.

The facts before the Court at the original hearing are stated ante vol. XI., page 511.

By the decree then made, dated 19th August, 1865, Statement. it was declared that the defendants *John Richey* the elder and *William Augustus Baldwin* were not chargeable with rents received by *John Richey* the younger, or by *John Richey* the elder, or with rents which but for their wilful neglect and default might have been received ; and it was referred to the Accountant to inquire and state what portions of the property had been leased, and on what terms ; and to take the accounts between the parties. The Receiver was continued, and further directions were reserved.

On the 28th of February, 1867, the Accountant reported that the premises had been leased in 1854 for twenty-one years, renewable for twenty-one years more, at rents amounting in the aggregate to \$1404 per annum, that *John Richey*, the younger, was indebted to the estate in respect of rents and interest in the sum of

1867. \$9487 87; that the defendant *Baldwin* had received no rents; that there were none, which but for his wilful neglect or default he might have received; and that the sum of \$961 47 was in Court to the credit of the cause. This appeared to be the balance of what was paid into Court by the Receiver up to the 20th of December last, after payment of the costs of all parties.

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v.  
Richey.

It was stated at the bar that a further sum was in the hands of the Receiver for rents received since.

*Jane Richey* who married *Robert Mitchell* the plaintiff's father, was said at the bar to have died in October, 1851, before the act abolishing the law of primogeniture came into force (but the Court required the fact to be verified), leaving the plaintiff *John Ewart Mitchell* her elder son and heir-at-law. Their father also died before this suit was commenced. *John Richey* the elder, died the 30th of April, 1866. The money now in hand was composed of rents, part of which accrued before that date and part afterwards.

Mr. *Ferguson*, for the plaintiff.

Mr. *Fitzgerald*, for Mrs. *Wright*.

Mr. *Defoe*, for the defendant *Baldwin*.

Judgment. MOWAT, V. C.—Two points were strongly urged by the learned counsel for the plaintiffs—first, that Mr. *Baldwin* ought not to be discharged from the trust, and, secondly, that the plaintiff's guardian, who has been appointed by the Surrogate Court, has a right to receive the plaintiff's share of the rents now in hand, or which may hereafter be collected.

As to the first of these points, it was said that it would be difficult, if not impossible, to get a person, equally responsible and reliable, to accept the trust

without compensation. But I think it clear that Mr. *Baldwin* has a right to be discharged, though it may, for the reason suggested, be for the interest of the parties to retain him. The bill itself prayed that this Court should "appoint some suitable person to receive in future the rents, issues, and profits of the said lands and premises, and to pay over, invest, or make disposition of the same under the direction of this honourable Court." The defendant *Baldwin*, by his answer, declared himself to be "desirous of being relieved and discharged from the said trusts;" and the defendants, *Isabella Wright* and her husband, the other *cestuis que trust*, by their answer prayed that all three trustees should be removed from the trust.

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Richey.

The trustees under the deed executed by *John Richey*, the elder, and his wife (21st of April, 1837), were *Wm. Warren Baldwin*, *Joseph Hill*, and the defendant *Wm. Augustus Baldwin*. Both *Wm. Warren Baldwin* and *Joseph Hill* are dead. They died before the 30th of January, 1854, when the second trust deed was executed. On that or the following day, the surviving trustee Mr. *Wm. Augustus Baldwin* appointed Mr. *John Richey*, senior, and *John Richey*, junior, to be his co-trustees; and the following statements in the evidence given by Mr. *Wilson* at the original hearing as to what took place at this time (as reported by Mr. *Grant* (a), the original depositions not having been submitted to me), are material on the point I am now considering: "The intention was also to relieve Mr. *Baldwin* (the defendant) of any further trouble in connexion with the estate, by means of this arrangement. \* \* I think Mr. *Baldwin* did not act after Mr. *Richey* junior's appointment; for whatever he did was through me. He did not in person attend to such matters. He did not reside in town; and it was not convenient for him to give such

Judgment.

(a) Ante vol. XI. page 514.

1867. matters his personal attention. \* \* I have no doubt that the reason I told Mr. *Baldwin* that he would have no further trouble with the estate was, that Mr. *Richey*, junior, was to be the acting trustee. Mr. *Baldwin* wished to be discharged altogether. I think Mr. *Richey*, senior, would not have given up his life estate if his son was not to have the management of the estate. I think that was his inducement. \* \* The whole arrangement of 1854, including the new leases then executed, was considered a very advantageous one for all parties."

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v.  
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Judgment.

Now, if the state of the pleadings does not preclude the plaintiffs from insisting on Mr. *Baldwin's* being retained in the trust, the circumstances of *Richey* junior's having subsequently been guilty of great misconduct as a trustee, having also become insolvent, and being now removed by this Court from the trust, and of the other trustee, *Richey* senior, being dead, clearly entitle the remaining trustee to be discharged if he wishes. *Forshaw v. Higginson (a)*, was cited I think, for the plaintiffs, but in that case the Master of the Rolls stated the rule thus: "No person can be compelled to remain a trustee, and act in the execution of the trust. Every trustee may say, 'I will apply, and have the trusts executed by the Court of Chancery, and I will ask to be discharged from the trusts as incidental to that relief'." The same learned Judge said in *Gardiner v. Downes (b)*, "A trustee may file a bill to have the trust administered under the direction of the Court, to have the funds transferred into the Court, and the dividends paid to the tenant for life." In that case the trusts were so extremely simple that it was argued that they involved no duties whatever; which certainly cannot be said of the present trust; and the Master of the Rolls observed: "It is true that this Court does not allow a trustee to retire from the trust

(a) 20 B. 485.

(b) 22 B. 397.

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from mere caprice, and that there must be some alteration of circumstances to justify him. But when I look at the circumstances of this case, I find that the plaintiff became a trustee in the year 1825, and that after thirty years he files a bill to be discharged from his office of trustee. Mr. *Baikie*, his co-trustee, by whom what little duties there were had been performed, died in 1852; the plaintiff might then have said, 'I do not place any confidence in any person except Mr. *Baikie*, and on his ceasing to be a trustee, there has been such an alteration in the circumstances of the trust that I will no longer continue to act.' " A new trustee was accordingly appointed. The present case is manifestly far stronger for making such an appointment.

The objection as to the difficulty of obtaining proper persons to accept the trusteeship is disposed of by *Courtenay v. Courtenay* (a), where the Lord Chancellor observed that "it was a mistake to suppose that a trustee who is entitled to be discharged is bound to shew to the Court that there is some other person ready to accept the trust. The Court refers it to the Master to appoint a new trustee; but if no person will accept the trust, it may find itself obliged to keep the trustee before the Court, and not discharge him. The Court will, however, take care that the trustee shall not suffer thereby." Besides, it is contrary both to the intention of the settlors and to the rule of the Court, that this trust should be under the control of one trustee; and if other trustees cannot be found, that is not a reason against discharging the sole trustee remaining, but the reverse.

The remark of Mr. *Lewin* is just, that "were there no means by which a trustee could denude himself of that character, it would operate as a great discouragement to mankind to undertake so arduous a task (b)."

(a) 3 J. & LaT. 533.

(b) P. 434, 4th ed.

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Richey.

Something was said as to this not being the proper occasion for discharging the trustee; but I see no sufficient reason for putting the estate to the expense of any other proceeding for this purpose (a).

I proceed now to the second contention on the part of the plaintiffs, which was, that the plaintiffs' guardian, who is also their next friend in the suit, is entitled as of right to receive their money. No authority was cited for this demand; and I understand an opposite rule to have been the clearly settled doctrine of the Court for more than half a century; and it appears to be supported by the soundest policy.

*Judgment.* In *Blake v. Blake (b)*, before Lord *Redesdale*, the testator had appointed the defendant *J. Blake* testamentary guardian and executor, and gave him the management of his property, real and personal, for the benefit of the testator's children. An application was made on behalf of the children to have the personal estate paid into Court, and laid out for the benefit of the children entitled to it, all the debts of the testator having been discharged. Against this, it was urged on behalf of the guardian that, as the testator had committed the estate to his management, and as there was no imputation of insolvency or misconduct on his part, the Court ought not to take the fund out of his hands. But the following was the judgment of the Lord Chancellor: "Certainly the old law was as stated at the bar; but modern decisions are different; and it cannot be doubted that the alteration was very much for the benefit of all parties. Wherever there are no debts, or the debts are all paid, and there is no purpose for which it is to be left outstanding, the present practice is, to have the money lodged in

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(a) Vide — v. *Osborne*, 6 V. 455; — v. *Robarts*, 1 J. & W. 251: *Proudfoot v. Tiffany*, 11 Grant, 461.

(b) 2 S. & L. 26.

Court. When there, it is always ready for those entitled to it when the time comes for paying it to them; and the executor is discharged from any responsibility about it. In England, the good consequences of this alteration of the law are universally felt and acknowledged. I recollect many instances of its salutary effects. I remember the case of a minor entitled to a large personal fortune; part of it was ordered into Court, and another part allowed to remain with the executor, who was of acknowledged credit. The result was, when the minor attained his full age, he had £80,000 stock assigned to him by the accountant general, but the sum which was left with the executor was forever lost. In consequence of such cases, it has become a very general practice in England for testators to order their personal property to be lodged in the Bank, subject to the order of the Court of Chancery. I make the order in this case on the general principle, without the least imputation upon the executor."

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 ▼  
 Richey.

Judgment.

The learned counsel attached great importance to the enactment that a guardian appointed to an infant by the Surrogate Court "shall have the care and management of his or her estate, real and personal." But the English Statute, 12 Charles II. ch. 24, sec. 9, appears to give testamentary guardians powers quite as large; and the case I have referred to shews that, in securing the property, the Court of Chancery does not proceed on any want of authority in the guardian to manage it. The defendant there had, as well by force of that Statute, as by the express terms of the will, all the powers which our Statute gives to a guardian appointed by the Surrogate Court. Here too, I doubt not, the guardian is a gentleman of the highest character; but the danger to infants' money does not arise solely from the dishonesty of those who have charge of it. It arises, also, from injudicious management, or from some act of imprudence, misadvice, or over confidence; from inaccurate or inadequate

1867. information ; from misfortune ; from change of circumstances ; and from a thousand other causes,—against which neither purity of character on the part of a guardian or trustee, nor the present solvency of himself and his sureties, is any protection.

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The inaccuracy of the contention may be further illustrated by a reference to the ordinary rule, where a receiver is to be appointed, that the same person should not be both guardian and receiver.

*Orrok v. Binney* (a) may also be referred to. That case was decided twenty years later than the case before Lord *Redesdale*. It was a suit by an executor to whose children his testator had bequeathed a sum of £3,657 14s. 7d., four per cents, standing in the names of the defendants as trustees for the testator. The Master of the Rolls said: “The bill here is filed twelve years after the testator’s death. There is no suggestion that this fund is wanting for the purpose of paying debts. It has hitherto stood in the names of trustees, and the plaintiff now desires that it should be transferred to him; but is it not safer to have it secured in Court till the children attain twenty-one? If the executor were not so respectable as he is in this case, or if he were engaged in trade, could the Court hazard the property by handing it over to him? Being apprized that the fund is one belonging exclusively to infants, I must direct it to be brought into Court, not from any suspicion of the party, but upon general principles. There is sufficient ground for considering this to be a clear fund belonging to the infants, and the Court is bound to protect it. The infants should be added as parties to this suit, and the money brought into Court.” The bill

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(a) Jacob 523; see also *Widdowson v. Duck*, 2 Mer. 499; *Webb v. The Earl of Shaftesbury*, 7 V. 480: and cases collected in *Chambers on Infants*, 580, et seq.

was amended by adding the infants as co-plaintiffs; and a decree was afterwards made, directing the fund to be paid into Court, and the dividends to be paid to the father for the maintenance of the infants.

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v.  
Richey.

It is proper to add, that the cases I have cited may not apply where the fund is small, and the whole, or nearly the whole, may be required for the infants' education and maintenance or other immediate use (a); or where other special circumstances exist justifying an exception to the general rule.

The decree to be now made will direct *John Richey*, the younger, to pay into Court the amount found due by him, and to be removed from the trust. Three new trustees will be appointed, if proper persons can be found willing to accept the trust. Meanwhile the receiver must be continued. The decree will further direct, that half the money in Court and in the receiver's hands, after paying all costs and charges, be paid out to the defendant *Isabella Wright*, and that half the future rents be also paid to her. A proper allowance for the maintenance and education, past and future, of the infants will be settled in Chambers. (As the debt of *Richey jun.* is not likely to be paid, and the elder plaintiff is alone entitled to future rents, the allowance will be a sum sufficient for the maintenance and education of his brother as well as himself.) The receiver as long as he is continued, and the new trustees when appointed, will be directed to pay (until further order) the allowance to the guardian from time to time, by quarterly payments. The receiver will, from time to time, pay into Court, for the benefit of the elder plaintiff, the balances to which he is entitled. I hope no reference back to the accountant to carry out these directions, will be necessary.

Judgment.

(a) *Walsh v. Walsh*, 1 Drew. 64.

1867.

## STILEMAN V. CAMPBELL.

*Trustee—Money ordered into Court.*

Where the trustee for infants resided out of the jurisdiction, and a person resident within the jurisdiction had a contingent interest in the trust fund, the fund was ordered to be secured in Court, instead of being paid over to the trustee.

The testatrix, by her will, dated 21st October, 1861, gave the residue of her estate to her executors *Duncan Campbell* and *Nicol Kingsmill*, upon trust to convert the same into money; and, after paying her debts and certain legacies, to pay the balance to the deceased's sister *Frances Stileman* and her husband (the plaintiff) *William Stileman*, therein described as of Winchester, in the County of Sussex, England, a captain in Her Majesty's Indian Army, or to the survivor of them, or, in the event of the decease of both before payment, to the lawful guardian or trustee of *Amy Stileman*, *Arthur Stileman*, and *Leonard Stileman*, their three eldest children, to be disposed of as thereafter mentioned. And the testatrix gave the said money to the said three children in equal portions, share and share alike; and directed the said *Frances* and *William Stileman*, or the guardian or trustee of the three children, to invest the money in Government funds, or in good mortgages on real estate, for the benefit of the children; and the interest on the share of each to be expended in and about their education and maintenance respectively, until they were of age or married; and that they should then respectively receive their shares of the principal with benefit of survivorship. If all three should die before arriving at the age of twenty-one or marrying, the money was to go to their mother and father, or to the survivor; or, if neither was living at the death of the survivor of the children under twenty-one and unmarried, the money was to go to *Duncan Campbell*, or his next of kin. The will

declared that the receipts of the said *Frances* or *William Stileman* should exonerate the executors from liability, and that the executors should not be answerable for any subsequent misappropriation of the money. 1867.

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v.  
Campbell.

The testatrix died in the autumn of 1861. On the 16th of December, 1861, Mr. *Kingsmill* took probate of the will. *Duncan Campbell*, the other executor, did not prove or act as executor. *Frances Stileman*, the sister of the testatrix, died after the testatrix. Her husband survived her, and filed the present bill against the executors for an account, and payment to him, of the residue, for the benefit of his children, as directed by the will. At the hearing (20th of September, 1866,) the usual decree was made for taking the accounts of the estate.\* The Master, by his report, dated 14th February, 1867, found that all the debts and legacies had been paid; that of the residue, the acting executor, Mr. *Kingsmill*, had paid \$3,588 68 agreeably to the directions of the testatrix; and that the estate still remaining consisted of \$2,748.62, and the Bank interest thereon, and of a bond of two parties for \$1,600, which was supposed to be worthless. Statement.

The cause came on for further directions on this report.

Mr. *Read*, Q. C., for plaintiff, cited *Chambers v. Cochet* (a), *Chambers on Infants*, pp. 580, 582.

Mr. *Cattanach*, for defendant *Campbell*, cited *Howe v. Lord Dartmouth* (b), *The Governesses' Benevolent Institution v. Rusbridger*, (c), *Bartlett v. Bartlett*, (d),

(a) 2 Free. 116.

(c) 18 Beav. 467.

(b) 7 Ves. 137.

(d) 4 Hare, 631.

1867. *Danby v. Danby (a)*, *Holland v. Hughes (b)*, *Payne v. Stileman v. Campbell.*  
*v. Collier (c)*, *Leigh v. Macaulay (d)*.

Mr. *McLennan*, for defendant *Kingsmill*.

MOWAT, V. C.—Three questions were argued at the hearing on further directions, first, as to the costs of the suit—which I think, on the whole, should be paid out of the estate—and, secondly, as to whether the plaintiff was entitled to receive the residue of the estate, or whether, on the contrary, he should not bring into Court what he himself has received.

Judgment. I think it clear on the authorities that the money not yet paid over to the plaintiff ought not to be paid to him. The case is stronger on this point than *Mitchell v. Ritchey*, which I have just decided (*e*); for not only are infants the principal parties concerned, but the plaintiff is not resident within the jurisdiction of this Court—he is said to be living somewhere in Arabia; and *Duncan Campbell* has a contingent interest in the fund—which alone, according to *Bartlett v. Bartlett (f)* and the *Governesses' Benevolent Institution v. Rusbridger (g)*, would be a ground for securing the money in Court. The interest only will be paid to the plaintiff, to be by him applied to the maintenance and education of the children.

As to the money already paid over to the plaintiff, I think *Duncan Campbell* is entitled to an inquiry, if he desires it, as to what has become of it, and in what investments it has been placed and now stands; the Master to state special circumstances; further directions and costs as to the same being reserved.

(a) 16 Ves. 111.

(c) 1 Ves. Jun. 170.

(e) Ante p. 445.

(b) 5 Jur. N. S. 54.

(d) 1 Y. & C. Ex. 260.

(f) 4 H. 631.

(g) 18 Beav. 467.

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## RODGERS V. RODGERS.

*Unnecessary parties—Insolvent administrator.*

Where unnecessary parties were made to an administration suit, the Court refused to burden the estate with any of the extra costs thereby occasioned.

Where an administrator brought an unfounded action against the testator's widow, which she was put to costs in defending :

*Held*, that she could not claim these costs against the estate, and that her only remedy was against the administrator personally.

This was a suit for the administration of the estate of *Peter Rodgers*, deceased, who died on or about the 5th of March, 1863. The deceased by his will devised to his wife *Agnes Rodgers* and his son *Daniel Rodgers* all that tract of land and premises known as the east half of lot number five, in the fourth concession of the township of Albion, to be used and enjoyed by them jointly, during the natural life of his said wife, to be accepted by her in lieu of dower, together with all the appurtenances thereunto belonging, saving and excepting one acre thereof which had been conveyed to *William Rodgers*; subject, however, to the payment of the following legacies or sums of money, which he ordered and directed to be paid to the several legatees by his executors out of his estate at the times and in manner therein mentioned; and from and immediately after the decease of his said wife, he gave and bequeathed the above mentioned lot of land to his son *Daniel Rodgers*, his heirs and assigns forever. He gave and bequeathed to his daughter *Margaret Pyke* the sum of \$200 to be paid in one year after his decease; to his son *Thomas Rodgers* the sum of \$200, to be paid in two years after his decease; to his daughter *Mary Pyke* the sum of \$200, in three years after his decease; to his son *David Rodgers* \$200, in four years after his decease; to his daughter *Hannah Rodgers* \$200, in five years after his decease; to his son *William Rodgers* \$20,

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and to his son *Peter Rodgers* \$20, to be paid to them in six years after his decease. And he ordered and directed that his daughter *Lilly Rodgers*, the plaintiff, should be kept and supported in a proper manner by his wife and son *Daniel*, out of the proceeds of the farm, until the plaintiff should attain the age of eighteen years, when she was to be paid \$200; and he ordered and directed that his mother should be supported by his wife and son *Daniel* as long as she chose to live with them; and, if she chose to leave them, she was to be paid \$20 on the first day of January in each year during her natural life. And, lastly, he gave and bequeathed all his personal estate, goods and chattels, of what nature and kind soever, to his said wife and son *Daniel Rodgers*, whom he thereby appointed executrix and executor of his will.

Statement.

*Daniel*, to whom jointly with the testator's wife the testator thus devised his property subject to the legacies, and *Thomas Rodgers* one of the legatees, died a month after the testator, intestate and without issue. The widow disclaimed all interest under the will, and *Abraham Rodgers* took out administration with the will annexed.

The bill was by *Lilly Rodgers*, an infant of about eight years old, suing by her next friend; and the defendants were the widow, the administrator, the other children of the testator (being also the heirs and next of kin of the testator and of his two deceased sons), and the husbands of two of his daughters who were married.

The Master having made his report, the cause now came on for further directions and costs.

Mr. *Blain*, for the plaintiff.

Mr. *Hoskin*, for *Hannah Rodgers*, now *Hannah Wells*, an infant.

Mr. *Ferguson*, for *Agnes Rodgers* the widow.

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Mr. *J. A. Boyd*, for *William Rodgers*.

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Mr. *Bain*, for the other defendants, except *David Rodgers* against whom the bill was *pro confesso*.

MOWAT, V. C.—It was quite unnecessary to make so many defendants as I find to this bill. All the children are in the same interest, and the first three rules of the 6th Order of 3rd June, 1853, clearly shew the proper practice, the neglect of which I have had occasion in other cases to condemn (a):—1. “Any residuary legatee, or next of kin, may have a decree for the administration of the personal estate of a deceased person, without serving the remaining residuary legatees or next of kin. 2. “Any legatee interested in a legacy charged upon real estate; or any person interested in the proceeds of real estate directed to be sold, may have a decree for the administration of the estate of a deceased person, without serving any other legatee or person interested in the proceeds of the estate; and, 3. Any residuary devisee or heir, may have the like decree, without serving any co-residuary devisee or co-heir.” Judgment.

The reasons which are suggested for making all the legatees and heirs parties in the present case, notwithstanding these rules, are entirely insufficient; and it is my duty to see that the important rules I have referred to are not made a dead letter. The plaintiff will, therefore, have out of the fund the costs of the suit, as between Solicitor and client, save so much thereof as has been occasioned by making the defendants other than *William Rodgers* the administrator and *Agnes Rodgers* the widow, parties to the suit by bill. The property has been sold free from the widow's dower;

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(a) English v. English. 12 Gr. 441,

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and, even if she was not a necessary party to the suit, the estate has probably been sufficiently advantaged by making her a party, to justify the expense. She will therefore have her costs, and in taxing them the officer of the Court will see that she is allowed for no proceedings that were unnecessary on her part. But I see no substantial advantage in having the others parties to the suit in the first instance. All except the administrator are in the same interest as the plaintiff. *Peter Rodgers* was a debtor to the estate, and an account of the debt, it is said, was desired; but debtors are not proper parties to an administration suit, merely because an account of the sums they owe is needed. Any questions between the legatees, next of kin, or heirs, can be determined in the Master's office; and I do not see that any substantial questions between the parties, except in regard to matters of account (which the Master's office was the proper place for investigating), have ever arisen calling for adjudication by the Court.

No costs were asked for or against *William* or *Peter Rodgers*. There can be no costs up to decree (inclusive) in favor of the parties, other than the infant defendants, who were unnecessarily made defendants. Only one set of costs subsequent to decree can be allowed to the defendants *Margaret Pyke, James Pyke, Mary Pyke, Jonathan Pyke, David Rodgers, and James Wells (a)*. The costs of *Hannah Wells's* guardian will be paid by the plaintiff's next friend, and not added to the costs to which the latter is entitled out of the fund. The other defendants will pay their own costs. The administrator is found by the Master to be a debtor to the estate in a large sum, and was said on the argument to be hopelessly insolvent. *Peter Rodgers* is also a debtor to the estate in a considerable sum.

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(a) *Stevenson v. Abingdon*, 8 L. T. N. S. 719.

The debts of the testator will be paid out of the fund ; also, the amount coming to the widow for dower and past maintenance of plaintiff, say \$1,091 75. The Master finds that the sum which should be set apart and invested for the plaintiff's maintenance is \$1,125 ; and I perceive that the amount of the mortgage to be taken from the purchaser of the real estate, is \$1,090 (being one-third of the purchase money), at eight per cent. Perhaps, therefore, the more convenient course would be to make this mortgage \$1,125 (the purchaser retaining the difference out of the amount he was to pay in cash), and to treat the mortgage as the investment for the plaintiff's maintenance. This I suggest for the consideration of the parties. The interest might be paid directly by the mortgagor to the proper guardian of the plaintiff.

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It being admitted by all parties that the testator's mother is still living, and that the statement in the bill to the contrary was an error, an affidavit of the fact may be filed (*a*), stating also the arrears due, and shewing the particulars necessary for computing the present value of an annuity of \$20 for the life of the legatee. As it is her wish, and that of all parties, that the value of this annuity should be paid, instead of the annuity itself, I see no objection to this being done.

Judgment.

Of the balance, there must remain in Court \$400, to meet the legacies of the plaintiff and the other minor legatee *Hannah Rodgers*, now *Hannah Wells*. The former is by the will made payable when the plaintiff reaches her eighteenth year, and the date of this had better be verified by affidavit and stated in the decree. Mrs. *Wells's* legacy is payable five years after the testator's death, which I presume will be the 5th of March, 1868. The interest in the meantime will go to those

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(*a*) General Order, June 1853, No. 22, sec. 2.

1867. entitled to it (*a*). The amount of this interest is so small, and there are so many amongst whom it is to be divided, that a mutual agreement respecting it would be expedient.

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Rodgers.

After providing for all these sums, the balance of the fund in Court may be apportioned at once among the parties entitled to it. For the purpose of such apportionment, the Secretary will take the present value of the legacies, as they are payable at future dates without interest. The decree will also state who are entitled, on the plaintiff's attaining eighteen, to the \$1,125 which is to be set apart for her maintenance until then.

The legacies to *William* and *Peter* will be set off against what they owe the estate. The decree may contain a provision for the execution of conveyances, which, it is said, the original decree omitted to do.

Judgment.

I presume the expense of a reference back to the Master will not be necessary to give effect to the present decree.

The widow claimed to be entitled to a further sum of \$93 70 costs taxed to her in another suit against the administrator, and which, in consequence of his insolvency, she is not able to recover from him. The facts I understand to be these. The widow gave her own note to a debtor of the testator for the amount of the debt, and this note was afterwards paid by the administrator out of the testator's assets and delivered up to the administrator, who, knowing all the facts, unjustly brought an action upon this note against the widow. She thereupon filed her bill to restrain the action, and obtained a decree with costs. I think the estate is not liable to her for

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(*a*) See *Ferrand v. Prentice*, Amb. 273; S. C. 2 Dick. 568; *Green v. Pigott*, 1 B. C. C. 105, and cases there cited.

these costs. They were occasioned by a wrong done or attempted by the administrator personally, and for which he alone is responsible to her. It was held in *Tanner v. Carter* (a) that even a debt necessarily incurred by an executor for testamentary expenses was not a lien on the testator's estate; that if the executor is not indebted to the estate, the assets will not be distributed without providing for the payment of the testamentary expenses to the person to whom they are owing; but that, if the executor is indebted to the estate in an amount equal to or exceeding such testamentary expenses, there is no remedy. It is obvious that the case of a claim against an executor or administrator incurred, not for services necessary to the estate, but through an attempted wrong on his part, must *a fortiori* be governed by the same rule.

1867.

Rodgers  
v.  
Rodgers.

## RE. McNULTY.

### *Lunacy.*

On an application in lunacy, the Court ordered a Sheriff to empanel a jury for the then next sittings of the Court. The matter was not proceeded with until the sittings succeeding the next, and the matter then coming on:

*Held*, that the panel was not properly constituted; that the Sheriff's authority to summon a jury was confined to the first sittings after the date of the order.

*Semble*, an alleged lunatic should receive the same notice of a trial before the Court, as of an inquisition under the former practice.

This matter came on before the Chancellor at the sittings of the Court at Lindsay, in the spring of 1867. Statement.

Mr. *Henderson* appeared for the petitioner.

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(a) 2 Jur. N. S. 413.

1867. Mr. *Hector Cameron*, for the alleged lunatic, objected  
Re McNulty. to the inquiry proceeding, on the grounds stated in the  
judgment.

VANKOUGHNET, C.—The order in this case directed the Sheriff to empanel a jury for the then next sittings of this Court. Those sittings were in last autumn after the order which is dated, September, 1866. I apprehend, therefore, that the panel for the present sittings is not properly constituted, as there was no authority to the Sheriff to summon it. Mr. *Cameron* for the alleged lunatic objects to it. I do not think that I can under the statute treat the jury as legally summoned or constituted.

Judgment. Mr. *Cameron* also says that he is not prepared to proceed, as neither the order for the hearing of this case before a jury, nor notice that it would be so heard, was served on the respondent till Monday last—and that the time is too short, and he is not prepared to proceed. I do not know what the time should be: I suppose the same as that given in an inquisition; as the proceeding here is in lieu of that under a commission.

At the request of both parties, I have had a private conversation with the respondent. He is certainly not insane, but very much infeeble in mind and body. He is perfectly rational, and knows all about his affairs; but is in such a weak state that he probably could be influenced against his will to dispose of his property. As Mr. *Cameron* declines now to proceed, and his client is entitled to a jury, I will make at present no order in the matter.

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## IRWIN V. FREEMAN.

*Fraud—Fraudulent conveyance—Surety.*

A. gave B. and C. a note signed by himself, which they discounted; when it matured B. and C. delivered to the holder, by way of renewal, a note purporting to be made by A., like the other note, and which such holder on that faith accepted, and he delivered up the old note. It being afterwards alleged that the renewal was not signed by A., but by another person of the same name, unknown to the holder and resident in a foreign country:

*Held*, that A. could not take advantage of this fraud; that his liability in respect of the note still existed in equity; and that the holder could sue within six years from the discovery of the fraud.

Voluntary conveyances are void against existing debts which are thereby defeated or delayed, whether the conveyances were fraudulent or not.

Where a debt, the remedy for which is barred by the statute of limitations, is acknowledged by the debtor, and judgment is recovered therefor, a voluntary settlement made before such acknowledgment and before the remedy was barred, is void as against a *fi. fa.* issued on the judgment.

This suit was brought by the plaintiff, an execution creditor of the defendant *William Freeman*, to set aside a deed of gift of certain land worth about \$2500, executed by the debtor *William Freeman* in favor of his son, the defendant *Andrew Gage Freeman*, dated 4th December, 1860. Statement.

The debtor on the same day executed another deed of gift to his son *William Rufus Freeman* of another parcel of land; and on the 13th of April, 1861, a like deed to his son *Adolphus Freeman*. These constituted all the lands of the debtor. He had some personal estate at the time of executing these deeds, which was afterwards sold under an execution against him at the suit of his son, the same *Andrew*, a defendant to the present suit. *Lewis*, another son, was the only witness who gave any account of the debt for which *Andrew* recovered this judgment; and he stated the consideration to be in part wages due to *Andrew* by their father,

1867. and in part, a note of his father for \$800, which the witness had transferred to *Andrew*. The *fi. fa.* against goods which was issued on this judgment, had been lying in the Sheriff's office, unexecuted, for two years before the plaintiff delivered to the Sheriff his *fi. fa.* against goods; but the goods were then sold under *Andrew's* writ, and the plaintiff's writ was returned *nulla bona*.

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v.  
Freeman.

The defendants alleged that *William Freeman* was not indebted to the plaintiff or any one else at the time of executing the deed to *Andrew*.

It appeared that on the 24th of January, 1858, *William Freeman* gave his note for \$800 (it was said by way of accommodation, and not for any debt he owed) to his son *Lewis*, who was then in partnership with one *Spraker*; that this note was assigned for value to one *Lyman Moore*, who advanced the amount of it to *Lewis Freeman*, or to *Lewis Freeman & Spraker*; that on the maturing of this note, *Lewis Freeman* and his partner, or one of them, delivered to *Moore* another note in its place, to which the name "*William Freeman*" was signed, and which was delivered to *Moore* as the genuine note of *William Freeman*, the maker of the original note, and was accepted by *Moore* as such; that this renewal note was itself renewed in the same manner; and so from time to time until the 24th of September, 1864, when *William Freeman* gave the last renewal, on which the plaintiff recovered his judgment (14th November, 1865). All the renewals, with the exception of two, were delivered up when retired by the new notes. These two excepted notes were accidentally left in *Moore's* hands, and were produced by him at the hearing. The other notes were not produced, and were said to have been destroyed. The genuineness of *William Freeman's* signature to the last renewal was admitted. The defendants disputed the genuineness of the other renewals, alleging

Statement.

that they were signed by some other *William Freeman*, who it was said resided in Illinois, whose signature thereto was said to have been procured by *Spraker*, but whom no witness that was produced knew or ever saw. 1867.

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v.  
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The cause came on for the examination of witnesses and hearing before Vice Chancellor *Spragge*, at the sittings of the Court at Hamilton, in the spring of 1866.

Mr. *Proudfoot*, for the plaintiff.

Mr. *C. Crickmore*, for the defendants.

His Honour disposed of the case at the close of the argument, holding that no case had been proved against *Andrew Gage Freeman*, and therefore as to him he dismissed the bill with costs ; but inasmuch as His Honour thought it had been made out that the plaintiff had been deceived by *Lewis* and *William Freeman* as well as by *Spraker*, into the belief that the debt of *William* was still subsisting, and consequently that at the date of the conveyance to *Andrew*, *William* was indebted to *Moore*, in addition to his other debts, he dismissed the bill without prejudice to the filing of another bill if plaintiff should be so advised. His Honour observed, however, that he did not mean to say that the plaintiff ought to succeed even if he should prove that the debt to *Moore* was in existence at the date of the deed. He observed that one circumstance in favour of *Andrew* was, that his father did not, by the conveyance to him, strip himself of all his property ; for the conveyance of the homestead to another son, *Adolphus*, was not made till some four months afterwards. The services of *Andrew* after he came of age were, His Honour thought, a motive with the father for making the conveyance, but under the circumstances did not constitute a valuable consideration so as to be a debt, nor did the answer place them upon that footing. The circumstances that these same services were after

Statement.

1867. wards made the ground of an action at law upon which *Andrew* had recovered judgment, and that his father's goods were sold in execution, and purchased by the other sons, though they had a very tricky appearance, were not in question in the suit and might possibly admit of some explanation. The Vice Chancellor, though he dismissed the bill as against *William Freeman*, did not give him his costs, on account of his complicity in the deceit practised upon *Moore*, if such deceit was practised, that is, if the renewal notes were signed by another *William Freeman*. If they were signed by the same *William Freeman*, then His Honour would refuse him his costs because his answer had untruly denied the continued subsistence of the debt.

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Freeman.

The plaintiff, being dissatisfied with the decision which His Honour then pronounced, set the cause down to be re-heard, and the same accordingly came on for re-hearing before the Chancellor and Vice-Chancellor *Mowat*.

The same counsel appeared for the parties respectively.

Judgment. VANKOUGHNET, C.—I think that the plaintiff is entitled to a decree declaring that the conveyance to *Andrew Gage Freeman* by his father *William Freeman*, was and is voluntary, and hinders, delays, and defeats the plaintiff and the other creditors of *William Freeman* in the recovery of their just debts, and so, as against them, is void.

It is admitted that in November, 1857, *William Freeman* gave to his son *Lewis* his promissory note for \$800. This note was retired by substituting for it another note signed by one *William Freeman*, who was not, as the defendants contend, the maker of the first note, but another *William Freeman* living in the United States, whose name was imposed upon the holder of the first note as that of its maker. If this story be true

(which I doubt), then a gross fraud was perpetrated upon the holder of the original note,—which, as against the maker of it, if not all the parties to it, could never have been considered as thus paid. This second note was, from time to time, thus fraudulently renewed, as alleged by the defendants, in the name of the *William Freeman* who was made to represent his namesake the defendant, until the 12th of September, 1864, when the defendant *William Freeman* made a new note in favor of his son *Lewis*,—which was given to *Moore* for the payment of the debt for which the defendant *William Freeman* had become originally liable. If the story of the defendants be true, then *William Freeman* the defendant never paid the original note, as another note was fraudulently substituted for it; and this would not discharge him. If he were merely an indorser or surety, a question might arise as to whether his position as such was not altered by the fraud of his son, and the carelessness of *Moore* in taking the forged or fraudulent security; but *William* was the maker of the original note, and he does not say that *Moore* knew he was only a surety, or that as surety he has been prejudiced; and he could not well have been so, for independently of other dealings by him, he at all events renewed his liability for this same indebtedness in September, 1864.

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Judgment.

I have said that I doubted the story of another *William Freeman* being substituted for the defendant *William*. I do so because of its improbability under the facts stated—because of the want of credence to be attached to the oath of the witness, the son, who perpetrated the alleged fraud, and now swears to it to secure the property from the consequences of his own debt—because I think it evident, from the father's own statements, that he knew of *Lewis's* embarrassments all the while, and must have known that his note was not paid, and he renewed it in 1864, as he says, to save his son from exposure: and he never inquired after it, and never

1867. ascertained from *Moore* what had become of it, or how it had been settled—and because further, on examining the signatures to the several notes given, from time to time, in substitution the one for the other, I think that the signatures were all those of the defendant *William*. But whether this be so or not, the original liability of *William* was never paid or discharged; and while it subsisted, and in December, 1860, he conveyed to the other defendant, his son *Andrew*, by way of gift, the property sought to be reached here.

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Freeman.

Judgment.

It is said that, at this time, he had other property ample to meet this debt and all other debts he owed, although this other property shortly afterwards disappeared, or was parted with by way of gift also. But this as against a mere volunteer is not sufficient; for he takes subject to the risk, not of the grantor having other property sufficient to pay his then existing debts, but of his paying those debts; and if these debts be not paid, he is not allowed to complain that a creditor fastens them upon property which, when given away to him, was at the time available for the payment of them (a), however much other property the grantor may at the same time have retained.

It might, perhaps, have been argued, though it was not, and indeed it is not set up in pleading, that the original debt was barred by the Statute of Limitations at the time the defendant *William* voluntarily renewed it. But it was not so barred when the defendant made a gift of this property; and it was only the remedy for recovery of the debt which ever could have been barred; and this bar the defendant removed when he renewed his liability. The decree should be with costs to the plaintiff, and in the ordinary shape.

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(a) *Spirett v. Willows*, 11 Jur. N. S. 70.

MOWAT, V. C.—If the account of the transaction given by the defendants is true, then the renewals were a gross fraud on *Moore*. But there is no evidence, direct or indirect, in support of the story, except that of *Lewis Freeman* himself, he and *Spraker* being the very persons guilty of the fraud to which *Lewis* deposes. It is impossible to admit such evidence to be sufficient to establish the defence offered, even if *Lewis* was not expressly contradicted, as in some respects he is, by the other testimony.

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The notes which were in existence when the impeached deed was executed not now being forthcoming, their genuineness has not been expressly established. But the original note being admitted, and its surrender having (if the defendants' story is true) been procured by fraud, even if it were true, as the defendants insist, that *William* was not himself a party to the fraud, yet I apprehend that he could not claim the benefit of it, and that the original debt was in equity still subsisting at the time the impeached deed was executed in 1860. *Scholefield v. Templer* (a) is an express authority for this view. There the defendant *Templer* was party to two promissory notes and a bill of exchange, as surety for one *Bell*. The holder of the notes and bill accepted from *Bell*, the principal debtor, a fictitious mortgage which the creditor believed to be genuine; and relying thereon, he released the surety, and erased his name from the securities. The object of the suit was to set up again the surety's liability; and the Vice-Chancellor, in pronouncing judgment for the plaintiff, said: "This case is brought within the broad principle, that no one can avail himself of fraud. As it was held in *Huguenin v. Baseley* (b) and the other cases cited in argument, that where once a fraud has been committed, not only is the person who has committed

Judgment.

(a) Johns 155, S. C. 4 DeG. & J. 433.

(b) 14 Ves. 273.

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the fraud precluded from deriving any benefit from it, but every other person is so likewise, unless there has been some consideration moving from himself. Where there has been consideration moving from a third person, and he was ignorant of the fraud, there such person stands in the ordinary position of a purchaser without notice; but, where there has been no consideration moving from himself, a third person, however innocent, can derive no sort of benefit or advantage from the transaction. \* \* The truth is, that, in all cases of this kind, where a fraud has been committed, and a third person is concerned, who was ignorant of the fraud, and from whom no consideration moves, such third person is ignorant of the fraud only as long as he does not insist upon deriving any benefit from it; but when once he seeks to derive any benefit from it, he becomes a party to the fraud."

Judgment. "I have already disposed of this case thus far, that the defendant *Templer* cannot insist upon anything which has occurred as releasing him from his liability. If it be placed upon the higher ground of fraud, it appears to me it would be fraudulent in him to receive any benefit from the transaction; or if it be put upon the mere ground of mistake, the Court in that view, as in the former, would replace things between him and the plaintiff in the same position in which they were before the release was given—in other words, would allow the plaintiff to proceed against him as surety."

There was an appeal from the Vice-Chancellor's decree (a), and the appeal was heard by the Lord Chancellor and Lords Justices, who affirmed the decree, so far as relates to the point in question. Lord *Campbell*, in pronouncing the judgment of the Court, said: "I am of opinion that the decree of the Vice-Chancellor,

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(a) 4 DeG. & J. 433. see *Teed v. Carruthers*, 1 Y. & C. C. C. 31.

so far as it holds the defendant *Templer* still liable, should be affirmed. I consider it to be an established principle that a person cannot avail himself of what has been obtained by the fraud of another, unless he not only is innocent of the fraud, but has given some valuable consideration. In the present case a gross fraud was practised by *Bell*. He represented that he had a mortgage which could be assigned as a security, and he executed a deed purporting to transfer a mortgage which in fact did not exist. It is quite clear that the plaintiff must be taken to have given the letter of July, 1851, and erased *Templer's* name from the notes, and bill, in the belief that he had a mortgage security for the money in respect of which *Templer* was a surety. The bill is filed against *Templer* as a surety, and the defence which he sets up is a release obtained through the fraud of *Bell*, a defence which, in my judgment, cannot be sustained."

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v.  
Freeman.

Judgment.

The same case and *Blair v. Bromley* (a) shew that the lapse of time is no bar to relief, it not being alleged that six years had elapsed since *Moore* became aware of the fraud. Indeed there is no evidence that he was aware of it until it was set up in the present suit. But, if sufficient time had elapsed to constitute a bar as against *William Freeman*, he did not choose to avail himself of this defence, and, when applied to, gave the new note on which the plaintiff has, as indorsee of *Moore*, recovered his judgment; and I find no authority, and perceive no reason, for holding that the debt in such case should not be treated as thereby revived against a voluntary grantee of the debtor, as well as against the debtor himself.

This debt, then, being due at the time the impeached deed was executed, *Spirett v. Willows* (b) is an express

(a) 2 Ph. 354.

(b) 11 Jur. N. S. 70.

1867. authority that the deed of gift is void as against the plaintiff, whether it was fraudulent in actual intention or not ; and it is unnecessary to consider further whether there was intentional fraud or not in giving the deed. Lord *Westbury* in that case declared the rule to be that, "If the debt of the creditor, by whom the voluntary settlement is impeached, existed at the date of the settlement, and it is shewn that the remedy of the creditor is defeated or delayed by the existence of the settlement, it is immaterial whether the debtor was or was not solvent after making the settlement. It is obvious that the fact of a voluntary settlor retaining money enough to pay the debts which he owes at the time of making the settlement, but not actually paying them, cannot give a different character to the settlement, or take it out of the statute. It still remains a voluntary alienation or deed of gift, whereby, in the event, the remedies of creditors are delayed, hindered, or defeated. I am, therefore, of opinion that this settlement is void as against the plaintiff."

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Freeman.

Judgment.

*Moore* was a witness for the plaintiff, and admitted that he was interested in the object of the suit, being liable to the plaintiff as indorser of the note. But *Johnston v. Smith (a)* shews that this circumstance does not make him an incompetent witness.

I am of opinion that the impeached deed is void against the plaintiff, and that, on default of payment of the amount due him on his execution for debt, interest, and costs, and the costs of this suit, the land should be sold in the usual manner.

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(a) 10 U. C. C. P. 220.

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## McINTYRE V. CAMERON.

*Practice—Hearing—Amendment.*

The defendant, by his answer, set up a compromise and settlement of the plaintiff's claim, and proved the same at the hearing; whereupon the plaintiff asked liberty to amend for the purpose of impeaching this settlement. The Court granted the leave on payment of costs, but, without the right to use again the evidence which had been taken in the cause.

Examination and hearing at Sarnia.

Mr. *F. Davis*, for the plaintiff.

Mr. *Blake*, Q. C., for the defendant.

VANKOUGHNET, C.—I think the plaintiff cannot Judgment. succeed on the present record, admitting all his allegations to be true. The defendant has proved a compromise and settlement subsequent thereto, as set out in his answer. This is in no way impeached, as it must be by pleading before it can be even questioned. The issue here is simply on the fact of such a settlement having taken place. The plaintiff asks for leave to amend; if granted he will have to recall the witnesses: for the defendant, on the issue here, was under no necessity to cross examine them, and I could not, therefore, allow the present evidence to be read against him on an altered record; and plaintiff will have to pay all the costs. The question is, shall he be allowed to amend, or shall the bill be dismissed with costs without prejudice to the filing another bill impeaching the settlement? I will grant the plaintiff leave to amend if he desires it (although he will derive little benefit from it) on payment of costs, and without the right to use again the evidence already taken unless by consent.

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## PHERILL V. PHERILL.

*Written agreement—Contemporaneous parol agreement.*

On a division of real estate a written agreement was signed providing for the payment of \$1,100 to D. P., one of the parties interested, to make his share equal to the others :

*Held*, that evidence was inadmissible of a contemporaneous verbal agreement that the amount agreed to be so paid was \$1,800 part of the difference depending on a contingency.

Statement.

The bill in this case was filed by *William Pherrill* against *David Pherrill*, *John Taber* and *Sarah* his wife ; *Orlando F. Rutherford* and *Elizabeth* his wife ; and *Elizabeth Lawrence*, for the purpose of having the rights and interests of the several parties in the property of the testator *Stephen Pherrill* declared, and also to ascertain what, if anything, was due to the defendant *David Pherrill* on the footing of an agreement which had been entered into by the several parties in the words following : “ Minutes of agreement made and entered into on the 22nd day of June, 1850, by and between *David Pherrill* of the Township of Scarborough, in the County of York, in the Province of Canada, yeoman, and *William Pherrill* of Whitby, in the County and Province aforesaid, innkeeper, witness that whereas under and by virtue of one or more devises contained in the last will and testament of *Stephen Pherrill*, late of Scarborough, aforesaid, deceased, a certain estate therein mentioned and styled the Homestead is, in the opinion of the aforesaid parties, a tenancy in common : And it is hereby agreed by the said parties that the same shall be so considered merely for the purpose of adjusting the claims of parties entitled thereto, as well in order to partition the said estate with the consent and under the direction of the parties concerned, in order to which adjustment and partition it is hereby expressly understood that *David Pherrill* representing the interest of the tenant-in-tail under

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the devises before alluded to, as well for the purposes as for the parties aforesaid is of the first part; and *William Pherrill* in his capacity of attorney for the legatees claiming under the devises aforesaid for the purposes of adjustment and partition, do and shall by virtue of this agreement, represent the interest of the legatees aforesaid, and in prosecution of the object of this agreement as before expressed, they the said parties do mutually consent to the following arrangement, that is to say in the manner and after the terms following:— That it is mutually agreed that the said *David* as tenant-in-tail under the devises before alluded to shall have and hold to his own use and benefit as such tenant-in-tail, all that part of lot No. 24 in concession B in Scarborough aforesaid, with the appurtenances belonging thereto described as follows, that is to say, all that part of said lot 24 lying east of a certain line drawn from a certain post planted in the northern extremity of said lot, extending to the water's edge of Lake Ontario, running parallel to the eastern limit of said lot. It is also mutually agreed upon by and between the said parties, that the legatees aforesaid through the medium of a certain trust created and expressed in and by the devisees before alluded to, shall as aforesaid (through their trustees as tenant-in-common) with the said *David* for the purposes of this agreement, and in strict accordance with the meaning of the aforementioned *Stephen Pherrill*, take immediately upon the execution of these presents to their own use and benefit all that part of said lot No. 24, together with the appurtenances belonging thereto lying west of the division line drawn as before stated, without the interruption, molestation, hindrance or denial of the aforesaid *David*, or of any person or persons claiming from, by or under him. It is also mutually agreed upon by the parties to this agreement that in order to an equitable adjustment of claims as aforesaid, the legatees before mentioned do and shall (through their trustees as aforesaid) pay, or

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1867. cause to be paid to the said *David* or his legal representative, the full sum of two hundred and seventy-five pounds in three equal annual instalments, the first thereof to become due and payable on the 1st day of July, 1851, and the remaining two instalments in the two succeeding years as aforesaid. It is also mutually agreed that the said *David* shall, whenever he may deem proper, be permitted to remove from off said westerly partition, and convert the same to his own use, a certain frame dwelling house situated immediately in the rear of a certain brick house in said partition. Also it is expressly understood that the parties entitled to said westerly partition shall and may, at their option, remove to their own use a certain stable and shed together with a certain old barn sill on the easterly partition as before described."

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The plaintiff *William Pherrill* was the eldest son and heir-at-law of the testator who died on or about the 16th April, 1842.

Statement.

A decree in accordance with the prayer of the bill was made, and on proceeding thereunder before the Master, the defendant *John Taber* was examined on the part of *David Pherrill*, and in his evidence stated as follows:—

"My interest in right of my wife in the property in question will be less in proportion as the interest of *David Pherrill* is increased. I drew the agreement now shewn to me (above set forth.) \* \* \* I drew up the agreement at the instance of *David* and *William Pherrill* (the plaintiffs). The sum mentioned in the agreement is £275; the original sum which was to be allowed to *David* as the difference between the easterly and westerly partitions was \$1,800. It was reduced by one-fifth part as being his portion as a co-sharer in the westerly division with the devisees under the second

codicil to the will of the testator. It was the intention, notwithstanding the wording of the agreement, that *David* was to continue to be interested in the one-fifth part of the westerly division as one of the parties interested, he would have to bear his own portion of the \$1800. Accordingly, he was charged with \$300 as representing the sixth part of the \$1,800. If his own one-fifth part of the westerly division is to be given over to the other parties entitled to the five-sixths of the westerly division, he ought to be paid the \$300, or he would be giving up his sixth part of the westerly division without receiving any value for it. I never knew what I have now stated to have been disputed as the true understanding in the family of the testator up to the time of the commencement of the present litigation; but it was always spoken of as the true understanding. The \$400 now claimed by *David Pherrill* was agreed to be allowed by *David* to *William*, as representing himself and the others as their attorney, provided that no litigation should be instituted by *William* to contest the will of the testator as he had previously threatened. A suit was afterwards instituted by the plaintiff as heir-at-law, in the Court of Chancery to contest the validity of the will of the testator. After evidence was taken he withdrew the suit. I consider that the \$400 was to be given to purchase peace. At the making of the agreement the sum of \$1800 was further reduced by deducting the \$400 in addition to the \$300, leaving the £275 mentioned in the agreement. I consider that the bringing of the suit I have mentioned by *William* was a breach of the condition on which the deduction of the \$400 was made. My recollection is quite clear as to the understanding in regard to the agreement. The paper I drew up was a mere preliminary agreement for something more formal.

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Pherrill.

Statement.

“When the agreement was drawn *David Pherrill* and *William* were together at my house, and they had

1867.

Pherrill  
v.  
Pherrill.

been consulting together for two days before at my house, after their deliberation I drew the agreement at their instance. They told me what they had agreed upon, and I embodied it in the agreement. I solemnly say that the understanding was that *David* was to retain the one-sixth of the westerly division. I understood that the division was to be between *David*, as the tenant in tail under the will, and the devisees who were entitled under the terms in the second codicil to the will. I cannot call to mind any particular expression of *William* on which I found my belief that he understood the division was to be in this way; but I found my belief this was to be the division from nothing being said to the contrary by *William*. They told me that the difference in value between the eastern and western division was \$1800, but they did not tell me how they arrived at or assessed the difference. I cannot say which of the parties named to me the \$1800, but one, or both of them, did so. The \$1800 was not mentioned in the agreement, in consequence of the deductions I have stated, the written instrument I drew was intended to express their agreement, and I believe it does unless there was an error in its expressions. The deductions were not put in the agreement because the parties to the agreement thoroughly understood them. The written part of the agreement was quite as well understood by them as the unwritten part; I thought that what the parties agreed to was as stated in the written instrument, except as to the \$300 and \$400, which were deducted from the \$1800 at the request of both parties; I cannot say if there were differences between the parties not settled by this agreement; I felt an interest in getting the matter adjusted, and thought at the time it was finally adjusted. I understood that the \$400 were deducted by *David* in consideration of *William* not contesting the will. *William's* declaration was, that he was seeking to get all that he could for himself and his sisters. The \$400 were not expressed in the writing,

Statement.

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v.  
Pherrill.

because it was not mentioned as requisite to be inserted, as it was previously understood, and because it was understood that it was not necessary to be expressed in the written agreement. *William* told me previous to this, that *David* had agreed to allow him \$400 provided he would not contest the validity of the will. I do not know what was the discussion between the parties during the two days they were together before the agreement was drawn. *David's* right to the one-sixth of the western division was never disputed that I ever heard, after the agreement was signed until the present suit was commenced: I always understood that the \$400 were to be for the benefit of all parties interested in the property excepting *David Pherrill*. I understood from *William* himself that he would litigate respecting the will if the \$400 were not thrown off. \* \* \*

When I spoke of making the divisions equal in connection with the \$400, I did not refer to the partition under the agreement, but as regards the rights of the devisees under the will and codicils of the testator. *William* and *David* were both present when I drew the agreement marked exhibit B. I cannot say which of them gave me the instructions as to it. What one said the other heard. On the same occasion the written and unwritten part of the agreement were stated to me, and both were concurred in by the parties."

Judgment

Upon this evidence the Master reported against the claim of *David Pherrill* in respect of the \$400 and \$300, so alleged to have been deducted from \$1800, as the amount agreed to be allowed to him. From this finding of the Master *David Pherrill* appealed on the ground, amongst others, "that the Master rejected the evidence taken before him of the said *John Taber*, whereas he ought to have admitted the same, and given effect thereto."

Mr. *Kingstone* for *David Pherrill*.

1867. Mr. *McLennan* for the plaintiff.

Pherrill  
v.  
Pherrill.

Judgment.

VANKOUGHNET, C.—The defendant contends that he should have been allowed by the Master the two several sums of \$300 and \$400 on the evidence of one *Taber*, which, assuming it to be true, shewed that at the time of the making of the written agreement of the 22nd of June, 1850, and just before it was prepared and signed *William Pherrill* the plaintiff, as representing himself and his sisters, agreed that the sum to be paid *David* for his share should be \$1800, of which the sum of \$300 was to be subsequently paid to *David*—being the \$300 in question,—and the sum of \$400, being the \$400 in question, was to be remitted or given up by *David* on the faith and understanding that *William* would not contest the testator's will, as he had previously threatened to do; and as is now alleged he subsequently did; thus giving *David*, according to his contention, a right now to claim the \$400, inasmuch as the consideration on which it was given up has failed. The agreement of the 22nd June, 1850 is positive in its terms and meaning as to the sum to be paid to *David*, in order to an equitable adjustment of claims; and that sum is \$1100. The defendant *David* now says that the sum which he was to have was this sum, and the \$300 in addition. Is not this an attempt to alter the written agreement between the parties by which the sum is fixed? If an agreement stipulates for payment of \$1100 as purchase money of land, can the vendor say "It was agreed, orally, to pay me \$300 more." *Lindley v. Lacey* (a) is relied upon as authority for this position, and it is contended, in analogy to the facts of that case, that the stipulation for the \$300 is an agreement independent of, and collateral to the written agreement which followed it. I do not think so. I think it can only be treated as an agreement for part of the purchase money which

the written agreement fixes at \$1100, and which it is sought by evidence of an oral agreement to make \$1400. *Lindley v. Lacey* goes a long way upon the facts disclosed by the report there, but I think it means no more than this, that there may be two agreements springing out of, and relating to the same subject matter and collateral the one to the other, but *independent*; the one of which may rest on oral, the other on written evidence. Can it be said that this stipulation for \$300 is independent of the consideration agreed to be paid to *David*; that it does not form part of the price which the written memorandum fixes? Mr. *Kingstone* ingeniously argues that it is a mere matter of account, that in fact it may be treated as a payment by *David* without consideration—as so much property erroneously given up by him, and that under the provisions of the decree, the Master may allow it in the accounts between the parties. But to do this, must not the Master necessarily violate the rule that a written agreement shall not be varied by parol, or rather oral evidence? In the same breath, however, Mr. *Kingstone* says, it is an independent agreement prior to the written one, and so within the authority of *Lindley v. Lacey*. If such be the case, then it seems to me clear that it is not covered by the pleadings or the decree, and is not therefore available to the defendant.

1867.

Pherrill  
v.  
Pherrill.

Judgment.

The Court confirmed the written agreement as beneficial for those for whom the plaintiff, *William Pherrill*, was acting; and directed the taking of all such steps as were necessary to the carrying it out, or proper to be considered under it, and ancillary to it. But the Court did not direct that the agreement for \$300 additional purchase money should be confirmed; nor, when it approved of \$1100 as the sum to be paid to *David*, mean that he should have \$1400 by any system of account taking or making, nor did the defendant present any such claim in his answer or at the hearing, nor ask for

1867. any direction in regard to it. On this latter ground, setting aside all other questions, I must also reject the claim to the \$400, which if it can be allowed, can certainly only be on the ground that it is a distinct agreement affecting, however, to the extent of that sum, the amount to be paid to *David* under the written agreement, which alone the Court has confirmed and directed to be carried out. *Non constat*, that the Court would have confirmed that agreement if it had been asked to couple or unite with it the agreements for the \$300 and \$400, or either of them.

Pherrill  
v.  
Pherrill.

### HAMILTON V. BANTING.

#### *Mortgage—Set-off.*

In a suit for foreclosure upon a mortgage given by the purchaser for part of the purchase money, damages or loss sustained by failure of title or of incumbrances or charges on the property sold, cannot, under the covenants for title, form the subject of set-off to the amount secured by the mortgage, before the amount is ascertained by action or otherwise.

Examination and hearing at Barrie.

Mr. *Boys*, for the plaintiff.

Mr. *McCarthy*, for the defendant.

Judgment.

VANKOUGHNET, C.—I think I must hold this case governed by the decision of my brother *Spragge*, in *Cockenour v. Bullock* (a), which states the law to be that damages or loss sustained by failure of title or by incumbrances or charges on the property sold, cannot in a foreclosure suit, form the subject of set-off to the

amount secured as the purchase money of the property on the mortgage; but that if relief in respect of the one or the other be sought in this Court, it can only be by cross bill, or by suit at law for breach of covenant. I regret to find that such is the state of the law. The tendency of all modern decisions is to avoid, as far as possible, circuity of action, and I do not see why, when the cross claims spring out of the one transaction, they should not be disposed of in the one suit. This Court has as difficult matters of calculation as those raised here to dispose of every day, and it seems hard that the defendant should be forced to go to law to ascertain the amount of the set-off which, it seems to me, he must have the right to claim eventually in reduction of the plaintiff's mortgage. But as the law is, so must I administer it. Though I am of opinion that the facts in support of the defendant's position are established, I can only make the ordinary decree for foreclosure.

1867.

Hamilton  
v.  
Banting.

### CROOKS v. HUGHES.

#### *Foreclosure—Practice—Costs.*

A bill of foreclosure on a mortgage by the Churchwardens of a Church at Brampton, claimed a lien for advances made by the mortgagee subsequent to the execution of the mortgage. One of the defendants, who had ceased to be a Churchwarden, put in an answer disputing this claim, the other defendants allowed the bill to be taken *pro confesso*. At the hearing the plaintiffs abandoned their claim for the subsequent advances, the Court dismissed the bill without costs as far as it related to this claim.

This was a foreclosure suit. The plaintiffs were assignees of the mortgagee *George Wright*, who, on the 13th of September, 1860, assigned to them all his estate, real and personal, for the benefit of his creditors. The mortgage was by two of the defendants *William Golding*

Statement.

1867. and *John Black*, the then Churchwardens of Christ Church, Brampton, to secure the purchase money of the land; and the bill stated that *Wright* had, with the knowledge and approbation of the congregation, advanced money by way of loan towards the building of the Church, and the plaintiffs claimed a lien therefor.

Crooks  
v.  
Hughes.

The defendants (besides *Golding* and *Black*) were the present Churchwardens, the three surviving trustees of the building fund of the Church, the Incumbent, and *Wright*. The bill was taken *pro confesso* against all the defendants except *Black*, who put in an answer submitting that the plaintiffs were not entitled to a lien for *Wright's* advances, and stating that *Black* had obtained a discharge under the Insolvency Act.

Mr. *Barrett*, for the plaintiffs.

Mr. *Huson Murray*, for defendant *Black*, consented to a decree as asked, but insisted on *Black* being paid his costs.

Judgment.

MOWAT, V. C.—The plaintiffs at the hearing abandoned any claim beyond the mortgage money; and the only question argued was as to *Black's* costs. It was said on his behalf that an answer was necessary as the bill sought a personal decree against him for any deficiency; but this, on examination of the bill, was found not to be so. It was then contended that as the bill set up a claim for the advances, which *Black's* answer disputed, he should have his costs. It will be observed that *Black* is not now a Churchwarden, and that he is but one of the mortgagors. Yet he is the only party concerned who considered an answer necessary for the protection of the property. It is not disputed that *Wright* made the advances for which the bill set up the claim which the plaintiffs now abandon, and that the congregation has had the benefit of them.

I think, under all the circumstances, the proper order will be to dismiss the bill without costs so far as it claims a lien for these advances. The decree otherwise will be in the usual form. 1867.

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MORRIS V. KEMP.

*Specific performance—Oil well.*

The owner of an oil well lot, on which was also situate a blacksmith's shop, which was known not to be the property of the owner of the land, agreed to lease the oil well and lot for a term of years without any express reservation of the blacksmith's shop; the intending lessee insisted on obtaining a lease without any reservation of such shop, and filed a bill for that purpose. At the hearing the bill was dismissed with costs.

Examination and hearing at Sarnia.

Mr. *Spencer*, for the plaintiff.

Mr. *Blake*, Q.C., and Mr. *McKenzie*, for the defendants.

VANKOUGHNET, C.—Without hearing anything for the defence, I think the contract alleged by the plaintiff is not made out. I think, upon the testimony of their own witness *Robertson*, excluding altogether the testimony of *Kemp*, that the lot was not to be leased, supposing it clear upon the evidence that the plaintiff was to have the whole lot, without a reservation of the blacksmith's shop. *Robertson's* evidence shows that there was a blacksmith's shop on the lot at the time of the bargain—that the plaintiff applied to *Kemp*, the intending lessor, for permission to strip it of the boards to be used in making an engine house—that *Kemp* then said he did not own it, and named who the owner was. It became Judgment.

1867. clear, then, I think, that *Kemp* did not intend to sell, and the parties must have understood he did not intend to sell the blacksmith's shop, and that some one else had a right to use it, and that this right must have been intended to be reserved, as none could use the blacksmith's shop without going on the land, and such an entry on the land would have been a breach of *Kemp's* covenant implied in the demise. Can I say that *Kemp* meant to subject himself to the consequences of such a breach? I think not, and that therefore the plaintiff's case insisting upon an absolute unconditional lease of the whole lot fails. The chief subject of the lease was the oil well; that was the thing spoken of; the land was a mere incident. *Ferguson* in the first part of his evidence speaks of the contract as relating to the well alone, but, in answer to a direct question subsequently, says it embraced the whole lot. It is not free from doubt if it did, though there is some independent evidence to show that it did. If parties will

Judgment. not, in this age and country, when almost every man can read and write, reduce their bargains to writing, they are not to be pitied if the Court refuses to execute them in the face of doubts as to their terms. Besides this difficulty there has been great delay in proceeding to enforce the contract, particularly when one considers the nature of the property in oil wells, shifting in value as it does every day. It is not necessary to consider any of the other difficulties in the plaintiff's way suggested by the answer. I dismiss the Bill with costs, striking out of the plaintiff's bill the alternative prayer for payment of the \$900, to be considered as thus amended yesterday, when the part of the bill relating to it was abandoned.

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1867.

## STEVENSON V. NICHOLS.

*Charges of fraudulent judgment—Circumstances held sufficient to rebut the same.*

A. commenced a suit against B., who had been previously sued by C., the plaintiff. Both suits were in the Superior Courts of law; but A. obtained judgment first, chiefly by having his case brought down and tried in the County Court. A. issued execution and sold the goods of B., who was his son, after which he issued execution against B.'s lands for the residue, and advertised them for sale. C. then filed his bill, charging that, at the time of recovering judgment nothing was due from B. to A., and that the judgment was collusive and fraudulent. But it appeared in evidence that A. had advanced various sums of money to B., or paid them on his account, and also gave him goods to a considerable amount, while there was no evidence of anything having been paid or given on account by B. :

*Held*, that the judgment of A. was good, under the circumstances; but C. consenting to allow A. to examine B. as a witness, a reference was directed to ascertain the amount actually due from B. to A. at the time of A.'s recovering judgment, reserving further directions.

The plaintiff, being a creditor of *Douglas Nichols*, Statement. one of the defendants (who was a son of the other defendant *Levi W. A. Nichols*), commenced an action against him in the Court of Common Pleas, and recovered judgment therein, in due course of law.

After the commencement of the plaintiff's action, *Levi Nichols* commenced another action in the same Court against *Douglas Nichols*. The same plea was filed in both cases; but *Levi Nichols* recovered judgment first, his attorney having had the cause brought down and tried at the first sitting of the County Court, under the provision of 23rd Vic, ch. 42, sec. 4.

On recovering judgment *Levi Nichols* issued execution against the goods and chattels of *Douglas Nichols*, and had the same sold by the Sheriff. He then issued execution against the lands of *Douglas Nichols* for the

1867. unsatisfied residue, and advertised them for sale. The plaintiff *Stevenson* then filed his bill against the father and son, charging that the judgment of the former was fraudulent and collusive; that *Douglas Nichols* owed his father nothing when the judgment was recovered, and praying that it might be declared void, and a perpetual injunction issued.

Stevenson  
v.  
Nichols.

The cause came on for examination of witnesses and hearing before his Lordship the Chancellor, at Belleville, on the 25th of April, 1867.

Statement.

It appeared from the evidence that *Levi Nichols* had conveyed his lands to his son *Douglas* for valuable consideration, in 1858, after which he removed to the United States, and resided there for several years, engaged in business as a broker and real estate agent. He then returned to Canada, some time before the commencement of the suits in the Court of Common Pleas. It also appeared that *Levi Nichols*, while absent in the United States, had remitted various considerable sums of money to his son, or paid them for his use, and that he had sold him a large quantity of barley after his return to Canada, for no portion of which *Douglas Nichols* had ever accounted. It also appeared that the judgment of *Stevenson* had been recovered on the covenants contained in a mortgage given by *Douglas Nichols*, on account of the purchase money of some land which he had bought from *Stevenson*, of which land *Stevenson* was then in possession, and for which he had received £100 of the purchase money.

Mr. *McGregor*, on behalf of *Douglas Nichols*, offered to execute a release of the mortgaged premises to the plaintiff, and on behalf of *Levi Nichols*, to pay the plaintiff the full amount due him on his judgment for a further conveyance of the land mortgaged, provided *Stevenson* would warrant the title which he had given

*Douglas Nichols* ; but the plaintiff, through his counsel, declined these offers. 1867.

Stevenson  
v.  
Nichols.

Mr. *Moss*, for the plaintiff, contended that it was incredible *Levi Nichols* could have been a creditor of his son for so large an amount, considering the circumstances of the parties ; and that the proceedings in the suit of *Levi Nichols* indicated collusion.

Mr. *McGregor*, for the defendants, argued that the evidence of the various payments was quite conclusive, and that *Levi Nichols* might well be supposed to have made all the advances to his son which he had claimed. He further contended, that there was nothing in the evidence which conflicted with the good faith of *Levi Nichols* in his action against his son. The law permitted a debtor to allow one creditor to recover a judgment in his suit while he might delay another by putting in a defence. But here the very same plea was filed in both suits, and if *Levi Nichols* recovered judgment first, by superior diligence, that was no reason why this Court should postpone his judgment to the plaintiff's, who, he contended, was an experienced man of business that had sold land to the defendant *Douglas Nichols*, a young, inexperienced man, for full value with a defective title, and then wanted to get another valuable farm with a good title along with it, under his claim.

VANKOUGHNET, C.—I am of opinion that the mere fact of a defendant entering an appearance or plea, although he does not mean to make any defence, and although it be done to give the suit an appearance of fairness, will not of itself, when he might have remained passive and allowed judgment to go by default, invalidate a judgment on the ground of its being a fraudulent preference ; even though the appearance and plea be put in early, so that the plaintiff is thereby enabled to get down, by writ of trial, to the County Court before another Judgment.

1867. creditor is in a position to take his case there in consequence of a more protracted defence. Whatever suspicion such a course may give rise to, the Court never could safely inquire whether a plea in one day instead of eight days was a fraudulent preference. Such inquiry would be most difficult and troublesome. If it be not established that the writ was issued in collusion between the parties, then the debtor remaining passive and permitting judgment to go against him, or pleading earlier than he might have done when he need not have pleaded at all, cannot, I think, stamp the proceedings with fraud as a preference under the act. But such a course of proceeding by a defendant may be fairly used as evidence or argument to affect the *bona fides* of the claim which has been made against him, and which he has thus permitted to pass so rapidly into judgment. With regard to the main question, I am of opinion that the claim of the plaintiff is so largely supported by evidence, independent of the admission of his son, the debtor, that I could not decree the judgment recovered upon it to be void as fraudulent. I believe all the witnesses for the defendant. His children evidently spoke with truthfulness, candor, and reserve. They could easily have sworn to the account throughout, had they chosen; but they would speak of nothing they did not know or remember. The defendant *Levi*, though shrewd and intelligent, is an old man, and in many things his memory may be at fault. He says himself it is defective. He was cross-examined on his answer, without the aid of counsel, and did not himself see the necessity of explaining, as he probably might have done, many things spoken in answer to direct questions; as for instance, when he spoke of \$2,500 as his annual income in the United States, I have no doubt he meant United States currency, which at the time would be equivalent to \$1000 in gold or Canada currency, of which he spoke yesterday. There are many of the items of the account of which no one but the defendant *Douglas*

Stevenson  
v.  
Nichols.

Judgment.

can speak ; and the plaintiff has excluded his testimony by making him a co-defendant, and charging him with fraud. 1867.

Stevenson  
v.  
Nichols.

While I will not declare the account or the judgment fraudulent, I will order an inquiry, on condition that plaintiff consents to *Douglas Nichols* being examined as a witness on behalf of his father : otherwise I dismiss the bill with costs.

Plaintiff consenting, decree inquiry, and order that defendant *Levi* be at liberty to examine *Douglas* as a witness.

Reserve further directions and costs.

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GOULIN V. CALDWELL.

*Lease—Right to cut timber.*

The owner of land made several leases of portions thereof, wherein it was stipulated that the lessees should have a right to cut the timber thereon ; and they on their parts covenanted to make certain improvements : the defendant accepted a lease in which it was agreed that the lessee should render up all improvements, but the lease did not bind him to make any.

*Held*, that the lease did not confer a right to cut the timber standing on the demised premises, notwithstanding the same were wild, and in a state of nature.

This cause came on for the examination of witnesses, and hearing before the Chancellor at the sittings of the Court, held at Sandwich. Statement.

Mr. *O'Connor*, for the plaintiff.

Mr. *Prince*, Q. C., for the defendant.

1867.

Goulin  
v.  
Caldwell.

VANKOUGHNET, C.—I think upon the evidence of Mr. *Gale*, that the defendant has deprived himself of any benefit which he might have claimed from the circumstance of the land being wild land, and the inference to be deduced therefrom—that he was to be at liberty to cut down the trees as affording him the only source of benefit from the lease. It seems that the defendant acted as agent for Miss *Duff*, the lessor, and procured Mr. *Gale* as on her behalf to draw three leases of three parcels of land similarly situated. Two of these leases to other parties contained provisions, authorising them to cut down the timber, and compelling them to clear the land for cultivation and to fence it. Miss *Duff* swears that the lease to defendant was to have been similar in its terms, except as to the fencing, which the defendant was not to be called upon to do, as he had paid her \$10 for the wood. *Gale* swears that, while the defendant was particular in seeing that the other two leases contained proper provisions as to draining and improving the land, he told *Gale* to omit any such provision from his lease, as he did not want to be bound to do anything. Miss *Duff* says that the lease was to have contained the agreement between her and the defendant ; that the defendant read it and the other leases over to her ; and that she thought they were the same, with the exception of the provision for fencing, which the defendant was not to make. The defendant has been too sharp ; he wanted to get the timber without any obligation in return to cut it, in such a way as to clear the land. Would it be right under such circumstances to give him a benefit which the lease does not stipulate for, and which is not to be implied from it *per se* ? Ought not the defendant to be left to its strict legal effect, which would not authorize him to cut ; and when we come to look at the condition of the property, as asked to do by defendant, must we not also look at his conduct and intention in taking a lease worded as this one is. Has he not by his own act deprived himself of the right to cut, which he undoubtedly would have

Judgment.

had, if the lease had bound him to clear or improve? 1867.  
 The only stipulation in the lease is that he shall render up all improvements. There might not be any; he is not bound to make any; and it seems that there was half an acre of land partly cleared, on which he might have built. I think defendant must be bound, by the literal provisions of the contract which he has made, and that he must account to the plaintiff for the timber cut, and be restrained from cutting any more, with costs. The lease must, under the circumstances, be considered as the agreement of the parties; and the defendant as having entered under it, without regard to his paying for the timber, as to which there is no memorandum in writing.

Goulin  
 v.  
 Caldwell.

### THE ATTORNEY GENERAL V. CHRISTIE.

*Free Church of Scotland—Site for church—Specific performance*

The owner of land agreed to sell a site for a burial ground and church in connexion with the Free Church of Scotland, if a congregation thereof could be gotten together. A church was built thereon, and a congregation in connection with the Free Church assembled and performed Divine service therein. Several years afterwards the great body of the congregation abandoned their connection with the Free Church; and they in conjunction with the vendor, assumed to hold possession of the church to the exclusion of such of the members as continued to adhere to the Free Church. On an information filed in the name of the Attorney General:

*Held*, that although at first conditional, the contract, by reason of a congregation having assembled in the church, had become absolute and that so long as even one member remained to claim the site and church on behalf of the Free Church, the right of that body continued, notwithstanding the change of opinion in the body of the members:—and, under the circumstances, decreed an injunction restraining any further interference with such right, and also a specific performance of the contract, with costs.

It appeared that several years ago one of the defendants, *Christie* the elder, had entered into a contract with certain persons, members of the Presbyterian Church

Statement.

1867. of Canada, in connection with the Free Church of Scotland, for the sale and conveyance of a piece of land for a site of a burial ground, and a church in connection with the Free Church of Scotland,—in case a congregation of that church could be assembled together; that the parties entered upon the land and erected a church in which such a congregation did assemble for Divine worship, but several years afterwards the great body of the congregation ceased to be in connection with the Free Church, and they, in concert with the vendor, sought to hold possession of the church and land to the exclusion of such of the members as still adhered to the Free Church. Under these circumstances the present information was filed at the relation of those members, praying amongst other things an injunction restraining the defendants from interfering with the possession, and a specific performance of the contract for the sale of the land. The cause, having been put at issue, came on for the examination of witnesses, and hearing before the Chancellor, at the sittings of the Court at Whitby.

Attorney  
General  
v.  
Christie.

Mr. *Strong*, Q. C., and Mr. *McLennan*, for the informants.

Mr. *Blake*, Q. C., and Mr. *Hector Cameron*, for the defendants.

*The Attorney General v. Murdoch*, (a) and cases there cited were referred to.

Judgment.

VANKOUGHNET, C.—I think it is made out that the defendant, *Christie* the elder, agreed to sell this land as the site of a burial ground, and of a church, in connection with the Free Church of Scotland, if a congregation of such church could be gotten together: that such a congregation was assembled, and did worship in the

church erected for their use, as in connection with the Free Church, and did so continue to worship for many years; and that the contract between *Christie* and the persons acting on behalf of the Free Church and of the congregation in that membership when it assembled, ceased to be conditional and became complete; and that the right of the Free Church to this site was thus established. I do not think that anything that occurred afterwards disturbed this right. It is quite true that many years later the great body of the members of the congregation abandoned their connection with the Free Church; but, so long as any one remained to claim the site and church on behalf of the Free Church, the right of the latter body continued, notwithstanding the change of opinion in the body of the members. No other denomination, I think, had a right to take possession of the church, and insist on holding and using it; and therefore, the defendants, who have so acted, are wrong-doers, and must be restrained from continuing this wrong, and pay the costs occasioned by it.

1867.

Attorney  
General  
v.  
*Christie*.

Judgment.

It is said no deed was tendered to *Christie* the vendor, and he does not know to whom to execute one. So far he is not to blame; but he is to blame in associating himself as one of those who resist the right of the Free Church members. If the bill had been filed against him merely for a deed, without tendering him one, and naming to him proper parties as trustees, he would have a right to claim his costs. As it is, he is liable, with the others, to the general costs of the cause, which the informants will have. A deed at their expense must be prepared, and tendered to *Christie* for execution. Trustees to be approved of by the Master or a Judge.

1867.

## McKAY v. DAVIDSON.

*Costs.*

The owner of land deposited his title deeds on the 19th May, for the purpose of having prepared a mortgage thereof, which was accordingly made out and executed on the 30th of the same month. The preceding day the mortgagor made a lease, of which, however, the mortgagee had not any notice. A bill filed by the lessee to restrain proceedings at law under the mortgage was dismissed; but, the mortgagee having in his answer deliberately sworn either to what was untrue, or to what he did not know to be true, the Court refused him his costs, although costs were given to the other defendants.

*Statement.* This was a suit instituted by the plaintiff in respect of some property at Lefroy, in the Township of Innisfil, and in respect of which the defendant *Davidson* had recovered judgment in an action of ejectment brought by him against *McKay* (a).

The defendant *Davidson* executed on the 18th April, 1861, a lease to the plaintiff for a term of five years. On the 30th May, 1864, he executed another lease for a term of four years to commence on the 18th April, 1866. On the 31st May, 1864, he executed a legal mortgage to the defendant *Davidson*. The mortgagor being in default, *Davidson* sold the properties comprised therein on the 27th October, 1865, to one *John Ross*, who, on the 16th November, 1865, conveyed to *John Douglas Laidlaw*, who, on the 28th May, 1866, conveyed to *Davidson* in trust for defendant *Douglas Laidlaw*.

The plaintiff by his bill prayed that he might be declared entitled to hold the possession and occupation of the premises for the term provided in the said second lease, and that the said mortgage might be declared subject to the terms and conditions of the

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(a) See *Davidson v. McKay*, reported 26 U. C. Q. B. 306.

said second lease, and that he might have priority over the said mortgage. That the said sale under the said power of sale of the land in question, might be declared invalid, and the said premises declared to be in the hands of the said *David Davidson* and *Douglas Laidlaw*, in the same position as if no sale had taken place.

1867.

McKay  
v.  
Davidson.

An injunction was granted *ex parte* to restrain the execution of the writ of *hab. fac. pos.*

The defendants by their answers denied notice of the lease in favor of the plaintiff; and the plaintiff subsequently abandoned that part of his case, seeking to set aside the sale on any ground of fraud or improper conduct at the sale, made by the defendant *Davidson*, under the power contained in his mortgage, retaining his right to say that the purchase money had not been paid, and by means of the conveyances that the land was subject, in the hands of *Davidson*, to the plaintiff's claim, and that *Laidlaw* also had notice thereof.

Statement.

Mr. *McMichael* and Mr. *Fitzgerald* for the plaintiff and the defendant *Burns*.

Mr. *Blake*, Q. C., and Mr. *Snelling*, for the defendants *Davidson* and *Laidlaw*.

The plaintiff submitted that the second lease was executed before the mortgage, and also that an additional property was inserted in the mortgage in consequence of the existence of the second lease; and that *Davidson* took the mortgage on terms of giving up the first lease.

The defendants denied all notice of the second lease, and all the mortgagor and lessor *Burns* swore to in his evidence, was notice of an intention to create a second lease; notice of an intention to create a deed will not

1867. bind. There is no case which goes so far as to say that a purchaser shall be affected by notice of a deed in contemplation. The defendants further contended, that the evidence clearly established an agreement to give a legal mortgage, a deposit of title deeds for the purpose of preparing, the legal mortgage having been made on the 19th of May, 1864; the second lease was executed the 30th of May, 1864, and the legal mortgage on the 31st of May, 1864, and it was submitted that this agreement to give a legal mortgage constituted a valid equitable mortgage.

McKay  
v.  
Davidson.

The following authorities were cited on behalf of the defendants *Davidson* and *Laidlaw*: *Edge v. Worthington* (a), *Ex parte Bruce* (b), *Hockley v. Bantock* (c), *Keys v. Williams* (d), *James v. Rice* (e), *Bulfin v. Dunn* (f), *Ex parte Kensington* (g), *Tudor's Equity Cases*, 28, 32; *Cothay v. Sydenham* (h), *Boulton v. Robinson* (i).

**Judgment.** VANKOUGHNET, C.—The plaintiff's bill proceeds upon the allegation of notice to the defendant *Davidson*, of the execution by *Burns* of the second lease to the plaintiff. This notice is denied by *Davidson* in his answer and examination, and is disproved by the plaintiff's witness, *Burns*, the lessor. The bill, therefore, fails entirely in this its only aspect. But it is said that *Burns* proves notice of his intention to execute the lease, and that therefore *Davidson* is bound. Notice of an intention merely, without anything more, would amount to nothing; but here it is coupled with the statement of *Burns* on oath, that in consequence of this declared intention of his to execute the second lease *Davidson*

(a) 1 Cox. 211.

(c) 1 Rus. 141.

(e) 5 DeG. M. & G. 461.

(g) 2 V. & B. 79.

(b) 1 Rose, 374.

(d) 3 Y. & C. Ex. 55, 462.

(f) 11 I. Chy. R. 198.

(h) 2 Bro. C. C. 391.

(i) 4 Grant, 123.

required, and *Burns* gave him additional security by introducing into the mortgage some lots in Bradford; and therefore that the defendant *Davidson* was a consenting party to the bargain for the lease. This case is not made by the bill, but it might be permitted in substitution for the case made, if the plaintiff's claim to relief were otherwise free from difficulty.

1867.  
 McKay  
 v.  
 Davidson.

It is admitted that the rent is a valuable and fair rent for the premises, and that if the defendant got the rent he would be satisfied. Now here comes the difficulty in the plaintiff's way; he does not prove that *Davidson* had any notice, that the rent reserved on the second lease was to be treated as pre-paid, or was to be paid otherwise than as appears on the face of the deed, viz., yearly *in futuro*. The receipt for the rent in full is not given till the August following the execution of the lease and mortgage.

Any one looking at the lease would find there merely the ordinary terms of a tenancy except the covenant for insurance; and no writing to the contrary appears till the following August, and it is merely a receipt for rent due—not to come due. Of what avail then would be an amendment? The defendant *Davidson* in his answer denies that the Bradford lots were introduced because of the second lease, but he says they were given because he gave up the first lease which had two years to run, and which had been deposited with him, as I think it was, in security. This is reasonable explanation enough, as the plaintiff by giving it up would lose his right to the rent, his mortgage having two years to run. But on his examination he not only does not give this explanation, but cannot account for the introduction of the Bradford lots.

In this conflict or uncertainty of statement, the explanation of *Burns* should be preferred. But as I have

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1867.

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Davidson.

already said, the bill does not make the case, and an amendment would be useless. Moreover, *Burns'* evidence has to be taken with caution as he is interested in proving that he paid both his creditors, the lessee and the mortgagee. If the amendment pointed at, though it has not been asked for, were permitted, I apprehend *Burns* would be a necessary and interested party to the bill, as the equity rests upon the agreement as to the Bradford lots, which was an agreement made with him and for his benefit, to enable him to pay the lessee his indebtedness to him. It is one of those cases in which a man is too sharp, and in which the party dealing with him neglects proper precaution. I think I ought not to interfere with the legal *status* of the parties, and I therefore dismiss the bill; but without costs as to the defendant *Davidson*, for he has either deliberately sworn to what was untrue, or he has sworn to what he did not know to be true, when he stated in his answer that the lots in Bradford were inserted in the mortgage because he was giving up the security of the lease. In his examination on his answer, he withdraws from this statement, and, though pressed on it, does not venture to confirm it. The other defendants to have costs.

Judgment.

1867.

HER MAJESTY'S SECRETARY OF STATE FOR THE WAR  
DEPARTMENT V. THE GREAT WESTERN RAILWAY  
COMPANY.

*Railways—Ordnance lands.*

Land purchased and used by the Toronto and Hamilton Railway Company, but not paid for or conveyed, does not vest in the company in fee simple absolute by force of the Upper Canada Act 4 Wm. IV., chapter 29.

The purchase money of Ordnance land, comprised in the second schedule of the Act, 19 Victoria, ch. 45, but sold by the principal officers before the passing of that act, is thereby transferred to the Provincial Government.

This cause came on to be heard upon bill and answers. Statement  
The principal question in the cause was as to the construction of the following clause in the act for transferring Ordnance lands to the Province, (a), viz.:

“Immediately on and from the passing of this Act, all and every the lands and other real property in this Province comprised in the second schedule to this Act annexed, being a portion of the messuages, lands, tenements, estates and hereditaments comprised within the provisions and meaning of the said in part recited Act of the seventh year of the reign of Her present Majesty, which, prior to the passing of this Act, were by the said recited Act, or otherwise, vested in the said principal officers of Her Majesty's Ordnance, and their successors in the said office, and which have been used or occupied for the service of the Ordnance Department, or for military defence, by whatever mode of conveyance the same shall have been so purchased or taken, either in fee or for any life or lives, or for any term or terms of years, or any other or lesser interest, and all erections and buildings which now are or which shall or may hereafter be

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(a) 19 Vic. ch. 45, sec. 6.

1867. erected and built thereon, together with the rights, members, easements and appurtenances to the same respectively belonging, shall, by virtue of this Act, be and become and remain and continue absolutely vested in Her Majesty the Queen, for the benefit, use, and purposes of this Province, according to the respective nature and quality of the said lands and other real property, and shall be subject to the provisions of the Act passed by the Legislature of this Province, in the sixteenth year of the reign of Her present Majesty, intituled, ‘*An Act to amend the Law for the Sale and Settlement of the Public Lands*,’ and any further provisions which the Legislature of this Province may from time to time enact in respect thereof, and shall be held, used, conveyed, and dealt with accordingly ; but subject nevertheless to all sales, agreements, lease or leases, agreement or agreements for lease, already entered into, with or by the principal officers of ordnance, or any person or persons authorised or empowered by the said principal officers to exercise the powers and authorities of the said in part recited Act of the seventh year of the reign of Her present Majesty, of or in respect of any such lands and other real property.”

Sec. of War  
v.  
G. W. R. Co.

Mr. Crooks, Q. C., and Mr. G. Kirkpatrick, for the plaintiff.

Mr. Strong, for *The Attorney General*.

Mr. Downey, for *The Great Western Railway Company*.

Judgment. MOWAT, V.C.—The principal officers of Her Majesty’s Ordnance, in 1853, agreed to sell to the Hamilton and Toronto Railway Company, for £250 sterling, a parcel of land then vested in the principal officers, and being part of the property known as the Ordnance Reserve on Burlington Heights. The Company entered into

possession, and built their railway across the land, but did not pay the purchase money. 1867.

Sec. of War  
v  
G. W. R. Co.

The Hamilton and Toronto Railway Company subsequently became amalgamated with the Great Western Railway Company, under statute 16th Vic., ch. 39, and the latter Company is liable for the obligations of the former.

By statute 19 Vic., ch. 45 (a), the Reserve in question was transferred to the Provincial Government ; and the question argued before me was whether the part so sold and the purchase money due in respect thereof passed to the Provincial Government.

It was admitted that the description of the property in the schedule is quite sufficient to embrace the parcel of land in question ; and the terms of the 6th section of the Act enacts that the lands comprised in this schedule shall, by virtue of the Act, be vested in Her Majesty, for the benefit, use, and purposes of the Province &c. ; but subject nevertheless to all sales, agreements, leases, &c., already entered into, with or by the principal officers of ordnance. The intention was, therefore, that such of the described lands as had been sold, or agreed to be sold, should pass to the Provincial Government, as well as those which had not been sold ; but that the sold lands should pass subject to the sales or agreements. The effect of such a transfer clearly was to give the Provincial Government a right to the purchase moneys of the lands so sold. I think that this is the necessary construction of the language employed, and accords with the intention manifested by the scope of the Act.

Judgment.

The learned counsel for the plaintiff argued that, by force of the U. C. Statute 4 Wm. IV., ch. 29, the abso-

(a) Vide 2nd Schedule.

1867. lute fee simple of land appropriated by the Company as this was, is vested in the Company without payment or conveyance; and that all that remained in the principal officers was a lien for the purchase money, which, it was argued, would not fall within the words of the Act. It is not necessary to consider how that would be if the effect of the Upper Canada Statute was as contended for, as I do not so construe that Statute.

Sec. of War  
v.  
G. W. R. Co.

I have carefully read the clauses which were relied upon, and the references which were cited (*a*), and I am clear that the Act has not vested the absolute fee simple of this property in the Company.

I think, therefore, that the plaintiffs having no legal or equitable interest in the property or contract, the bill should strictly be dismissed. But as the defendants are willing to submit to a decree therein (the Attorney-General, however, insisting that the money should be paid to the uses of the Provincial Government), the decree may be accordingly. No costs to any party (*b*).

Judgment.

The same question was discussed, between the same parties, on a motion in *Great Western Railway Co. v. Jones*, (*c*) relating to another portion of the Reserve on Burlington Heights. The order will go in that case also for the payment of the money to the Provincial Government. No costs of the motion.

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(*a*) The Earl of Harborough v. Shardlow, 7 M. & W. 87; Bruce v. Willis, 11 A. & E. 463; Redfield on Railways, 124 et. seq.; Shelford on Railways, 318.

(*b*) Vide Lord Advocate v. Lord Dunglas, 9 C. & F. 211.

(*c*) *Ante* p. 355.

1867.

SUTHERLAND V. ROSS.

*Parties—Personal representative of intestate domiciled out of Ontario.*

A., who was domiciled in Scotland, died there intestate, leaving some personal property. Three of his next of kin, a brother and two sisters, concurred in appointing an agent in Scotland to wind up the estate and transmit and account to them therefor; the agent did so, and transmitted to the brother some money and personal chattels as all that remained after paying the intestate's debts and funeral expenses. The brother paid the sisters their shares of the money, but kept all the chattels. In a suit by the sisters for a division of these, an objection taken to the absence of any personal representative of the deceased in this country, was over-ruled.

Hearing at Woodstock Spring Sitzings, 1867.

Mr. *Richardson*, for the plaintiff.

Mr. *J. A. Boyd*, for the defendants, cited *Penny v. Watts* (a), *Logan v. Fairlie* (b), *Arthur v. Hughes* (c), *Bond v. Graham* (d), *Morgan v. Thomas* (e), *Lowry v. Fulton* (f).

MOWAT, V. C.—This cause was heard before me at Woodstock, on the 2nd May last, when I required the defendant to file an affidavit as to certain letters not produced at the hearing. This affidavit has since been filed and transmitted to me, and annexed to it is a letter not previously produced, and of considerable importance. Judgment.

The facts of the case are these: In September, 1861, *John Ross* died in Scotland, the country of his domicile, intestate, and leaving some personal property. His next of kin are his two sisters, (the plaintiffs), the defendant *Alexander Ross*, who is the only surviving

(a) 2 Ph. 149.

(c) 4 Beav. 506.

(e) 8 Exch. 302.

(b) 2 S. & S. 284; S. C. 1 M. & C. 59.

(d) 1 Hare, 482.

(f) 9 Sim. 104.

1867. brother of the deceased, and one *Donald Ross*, the son of a deceased brother, and whose residence is in Liverpool, England.

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v.  
Ross.

The plaintiffs and the defendant *Alexander Ross*, reside in Upper Canada. All these facts appear from the evidence of this defendant. He also states, in his answer, that, by the desire and with the consent of the plaintiffs, he requested one *William Ross* to wind up and settle the affairs of the intestate, and to account to the defendant therefor. It further appears from the defendant's examination at the hearing that, at his suggestion, the plaintiffs joined in a Power of Attorney to *William Ross*, which the defendant forwarded to the attorney on their behalf, and that a copy of this power is in the defendant's possession, though not produced. The defendant's answer further states that in August, 1863, the attorney transmitted to the defendant £16 8s. sterling, together with certain gold watches, rings, and other articles of personal property, informing the defendant, and the defendant believes it to be true, that these were all the money and effects of the intestate which remained after paying his debts and funeral expenses. *David Ross's* share of the money of the deceased appears to have been retained, and the balance only transmitted to this country. Accordingly, the defendant paid each of the plaintiffs one-third of the amount he received, retaining the remaining one-third for himself. Whether an equivalent for *David Ross's* share of the chattels was likewise retained, or whether he abandoned his claim thereto, does not clearly appear. The witness who applied to the defendant for a division or settlement before the plaintiff instituted the present suit, was told by the defendant that *David* "had got his share of the property." But all that the plaintiffs claim by the bill is two-fourths of the chattels which the defendants received. The value of these chattels does not clearly appear. The defendant insured them for

Judgment.

£100, but this, he says, was to cover some title deeds that were in the same boxes. They came safely to hand, however, and have been kept by the defendant ever since, instead of being divided amongst the parties entitled.

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v.  
Ross.

The defendant gives two excuses for this conduct. The first is, that the intestate had, in his lifetime, expressed a wish that his deceased wife's relations should have these articles, and that the plaintiffs consented to the defendant's making this disposition of them. But there is not a tittle of evidence in support of either statement; and the defendant does not suggest that he communicated the alleged understanding to the wife's relations; nor does he explain why he did not; nor why, if he and his sisters were willing the wife's relations should have the chattels, they first got the articles transmitted to this country.

The other explanation which the defendant gives is, that, shortly after he received the chattels, he offered to deliver them to the plaintiffs and their husbands on their undertaking to settle any claims that might be presented against the estate; but he does not now pretend that there were any such claims, or that he apprehended any when he made this demand as the condition of giving up the plaintiffs' shares of the chattels. An undertaking to account for the chattels or their value, should any claims against the estate turn up, is the utmost that could fairly have been asked: a demand that they should pay all claims, without limitation as to amount, might very reasonably be refused. But there is no evidence either of the refusal or the demand; and there is evidence that, when an application was made on behalf of the plaintiffs for a settlement or a division of the property shortly before the suit was instituted, the defendant refused, pretending that there were some outstanding claims on the property, but not stating the nature of

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1867. them. If this pretence was not also a fabrication, it has very much that appearance. If there was any such claim as the defendant represented, the honest course would have been to ascertain and satisfy it. It certainly did not justify the defendant's keeping what, unquestionably, whoever was entitled to it, did not belong to the defendant. He was entitled to his share and no more, but he kept all from the plaintiffs and every body else; and he does not now set up by his answer any claim by *Donald Ross* or any one else, either on the estate generally, or on the specific chattels in his possession.

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Ross.

It appears, too, from a letter dated 14th May, 1863, from the agent and attorney in Scotland to the defendant, and which the defendant, in obedience to my direction, has produced on oath since the hearing, that his answer did not contain a full list of all the particulars received by the defendant.

Judgment. At the hearing, it was objected on behalf of the defendant, that the plaintiffs were not entitled to relief in the absence of a person authorized by some competent authority in this country to represent the estate of the deceased. This objection was not taken by demurrer or by the answer. It was admitted on the argument that no one had taken out administration in Canada. I think upon the statements contained in the answer and the evidence, that I should presume as between these parties that the chattels in question were rightfully transmitted to the defendant by a person lawfully authorized to do so by the laws of Scotland, and that the defendant received them, on behalf of the plaintiffs and himself, from their common agent; and this being so, I think that, under the circumstances of this case, the defendant is not entitled to retain this property on the objection that there is no personal representative in Upper Canada (a).

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(a) *Arthur v. Hughes*, 4 Beav. 506; *Logan v. Fairlie*, 1 M. & C. 59; *Arnold v. Arnold*, 2 M. & C. 256.

The decree will direct the Master at Woodstock to take an account of the personal property of the estate of the late *John Ross* received by the defendant and not accounted for to the plaintiffs, charging the defendant with any articles that may not now be forthcoming, and with any depreciation in the value of such as are still in the defendant's possession; and to sell such articles as remain; or to divide the same or any of them specifically, if he shall see fit. I give this direction for dividing the articles specifically, because some of them may have a peculiar value to some of the parties as memorials of their deceased brother. The Master is to be at liberty, if he sees fit, to appoint a receiver of the property, prior to the sale or division. The defendant says he has a claim of \$30 against the estate. An account is to be taken, therefore, of any sum he may be entitled to claim. The Master may, at the instance of the defendant, make *David Ross* or his representative a party to the suit. Just allowances to all parties. The defendant's misconduct appearing to have been the sole occasion of the suit, he must pay the costs up to the hearing, less, however, his costs of the other suit, and of the order of 21st May, 1866, amalgamating the two suits. It could only have been through a gross misapprehension of the practice of the Court that two bills were filed at the same time, for the same purpose, by the same Solicitor, one in the name of each sister.

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 v.  
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I say nothing at present as to the subsequent costs of the suit. I fear the value of the articles in question will hardly bear the expense of much further litigation, and I hope the Solicitors on both sides will render it unnecessary by recommending a friendly settlement. Meanwhile, I reserve further directions and costs.

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1867.

## GRIER V. ST. VINCENT.

*Assessment—County rate.*

Where a bill to restrain proceedings for collecting the township assessments of the year, on the ground of objections of form, and because of an overcharged assessment of small amount, was filed after it was too late to apply at law, to quash the by-law complained of, the Court, under the circumstances, affirmed on re-hearing a decree dismissing the bill with costs.

*Quære*, whether the township council is at liberty to provide for abatements and losses which may occur in the collection of the county rate in respect of personal property.

Statement.

The bill in this case was filed by a ratepayer of the township of St. Vincent on behalf of himself and the other ratepayers of the township, praying, that a resolution passed by the council of St. Vincent, on the 30th of September, 1865, imposing certain rates and taxes upon the property of the township, amongst others, 15 $\frac{3}{4}$  mills in the dollar for the county rate, including the school equivalent, 4 $\frac{2}{3}$  mills in the dollar for township expenses, including wharf debentures, might be set aside, and declared invalid and void; that the collector's roll might also be set aside and declared invalid and void; or that so much thereof as related to the county rate and township rate might be set aside and declared irregular and illegal, or that the roll might be properly rectified; that the defendant *Richmond* (the collector) might be restrained from levying the taxes so appearing on the roll to be collected from the plaintiff, and from the other ratepayers of the township whose names were entered on the roll. And that in case it should appear that the said collector and the defendants, the Corporation of *St. Vincent*, had collected and received any of the taxes so assessed against any of the ratepayers of the township, from any of them, that in such case the said defendant *Samuel Richmond* and the said corporation should account for the same, or for such portion thereof as had been illegally exacted, and might be ordered to refund

the same to the proper parties in that behalf, and that all proper accounts for the purpose might be directed : concluding with a general prayer for relief.

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Grier  
v.  
St. Vincent.

The cause came on to be heard before Vice-Chancellor *Spragge*, who dismissed the bill with costs as reported, *ante* volume xii, page 330.

The plaintiff thereupon set down the cause for rehearing, and the same came on to be argued before the Chancellor and Vice-Chancellor *Mowat*.

Mr. *Strong*, Q. C., and Mr. *McCarthy*, for the plaintiff.

Mr. *McMichael* and Mr. *Fitzgerald*, for the township of *St. Vincent*.

Mr. *Moss*, for the county of *Grey*.

Statement.

For the plaintiff it was contended that this case was distinguishable from *Carroll v. Perth (a)*, where the rate levied might or might not have been legal, and therefore it was necessary before any relief could be afforded to go behind the by-law and procure it to be quashed ; while here, the rate imposed being one which the council had no authority to impose, each ratepayer might maintain replevin in the event of a distress for non-payment of the amount levied. At the time the bill was filed the collector was in a position to distrain on all the non-paying ratepayers ; and in any view of the case the bill is sustainable as a bill of peace.

*Attorney-General v. Heelis (b)*, shews that the plaintiff has a perfect right to maintain this suit. In that case the question as to the right of one ratepayer to file

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(a) 10 Gr. 64.

(b) S. & S. 67.

1867. *Grier v. St. Vincent.* a bill to be relieved from the improper conduct of a corporation in levying a rate was raised in the strictest manner—by demurrer. Here the by-law imposing this rate, if even it were such as the council had a right to impose, was not sealed; neither was it signed by the presiding officer.

For the defendants it was argued that the plaintiff's remedy at law was complete for any injury he could possibly sustain, and under any circumstances he could not be heard to say he represented such of the rate-payers as had paid the taxes imposed; those who had paid the assessment should have been made defendants; if not all, some to represent all who had paid.

*The Corporation of London v. Perkins (a), The Mayor of York v. Pilkington (b), Eldrich v. Hill (c), How v. Broomsgrove (d), Re Price's Estate (e), Adair v. The New River Company (f), Lanchester v. Thompson (g),* were referred to.

**Judgment.** VANKOUGHNET, C.—The defect in the by-law or resolution in this case seems to me to be one of form, viz., the insertion in the column, which contains the county tax, of the amount ordered by the local municipality to be raised to meet the cost of collection, and provide for loss on the sum to be levied for the county. It seems to me at present, that the local municipality, *i. e.*, the township of St. Vincent, properly made this provision, although not bound to do so. It is exempted from accountability for loss in collecting the tax leviable on personalty; but it does not appear to me that this exemption disables it from preventing such loss, or

(a) 3 Br. P. C. 602.

(c) 1 Johns. C. R. 281.

(e) 3 Atk. 602.

(b) 1 Atk. 282.

(d) 1 Ver. 22.

(f) 11 Ves. 444.

(g) 5 Madd. 4.

rather making up such loss, by a proper allowance for the purpose in the shape of a local rate, and that the judgment of my brother *Spragge* in this respect is right. I think, however, that the by-law is wrong in point of form in containing this extra sum in the column which, the statute requires, should shew the county rate. This extra sum is not a county rate, but a local rate; and the municipality have nothing to do with the county rate or the column in which it is to appear. The clerk of the township council is to give it its proper place in the by-law or schedule, and it should stand thus by itself.

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Grier  
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But whether the alleged by-law is or is not a by-law, or merely a resolution, or whether it is bad in form or in substance, in providing this local aid to insure the collection of the full county rate, I am of opinion that we should not give any relief in this case. I am not disposed to encourage suits of this description, when the more expeditious and less expensive remedy at law is open to the complaining party; a remedy which the Legislature has indicated as the proper one. The resolution or by-law complained of was passed on the 30th of September, 1865. On the 9th of April following, and after the lapse of two terms of the Common Law Courts, a motion is made for an injunction to restrain the levying of the rate or assessment. The plaintiff does not allege that he was up to that time in ignorance of the passing of this by-law, or of the defects in it; but he waits until the machinery for the collection of the rates is set in motion, and then comes to this Court to stop it; when he might, months before, have had the question of the validity of the rate settled at law. Is it useful or expedient, under such circumstances, to exercise the jurisdiction which this Court possesses, and may in certain cases wisely apply? I think not. The plaintiff, for aught that we can see, is the only objecting party to the rate. That rate is only leviable for one year. Its

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1867. adoption, imposition, and collection, affect the taxes for the year only. It affects no permanent right; establishes no precedent or rule binding in the future.

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Its operation is limited to one year only. In such a case a party must come most promptly for the interposition of this Court; and, I apprehend, that he would not receive much support from the Common Law Courts, if he allowed a term or two to pass by, and then applied to upset proceedings, upon which all the municipal authorities, and probably the far larger number of the ratepayers, were acting and relying as a provision for the taxes for the current year. Courts of law will not always question by-laws, though they may be irregular or slightly in excess of the powers of the corporation; but will leave dissentient parties to their remedy by action: a process not likely to be resorted to, when the amount levied from each individual is so trifling as the excess complained of here. To restrain, unless at a

Judgment.

very early period, the proceedings which were being prosecuted under this by-law, would have caused great confusion. The taxes for the year could not have been collected; and difficulties, the extent of which it would not be easy to foresee, would have been thrown in the way. Of course a by-law may be so bad, so far in excess of the authority of the council, that it would be proper to restrain action on it; but then application for that purpose must be speedy. Would it be desirable—the plaintiff having come too late to raise the preventive arm of the Court—to make a decree by which an account should be taken of all the sums improperly levied from all the ratepayers of the municipality, and the municipality ordered to restore them; when, perhaps, all the ratepayers, except the plaintiff, submit to the levy, rather than to the consequences of having to pay a bill of costs, and of a fresh provision for collecting the year's taxes. I think the plaintiff may, on a bill framed on behalf of himself and all others the ratepayers, seek the interference of this Court to restrain action

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on an illegal by-law, in a proper case for it ; but when, as here, that is properly denied to him, the case becomes then one merely of a number of creditors combining together in one suit to recover amounts due to them severally, and in their own respective individual rights, from a common debtor. I am not aware of a precedent for any such bill. Were several actions brought against the municipality to recover money as levied under an alleged illegal by-law, the municipality would probably have the right to come here by bill, as in the nature of a bill of peace, to restrain those actions, till the question of the legality of the by-law was settled. See *Attorney General v. Corporation of Birmingham (a)*,

I think the decree should be affirmed with costs.

MOWAT, V. C.—In this case my brother *Spragge* dismissed the plaintiff's bill with costs, and the case was reheard before the Chancellor and myself.

Judgment

The objection of the plaintiff is, in substance, that, in pursuance of a resolution or by-law of the township council, the clerk, in preparing the collector's roll, added to the sums directed by the statute to be named in the column headed "County Rate," an allowance for the cost of collecting this rate, and for the abatements and losses which might occur in the collection of it, and for taxes on the lands of non-residents which might not be collected. It is not denied that the council was bound to provide for the cost of collecting the rate, and was bound also to provide money enough during the year to pay so much of the amount assessed for the county on the lands of non-residents as should not be paid by those liable to it. So far, therefore, as relates to these two parties, if the allowance had not been added to the county-rate column, it should have been

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(a) 3 L. R. Eq. 552.

1867. added to another column of the roll. The amount to be levied not having been increased by the allowance being added to the one column rather than to the other, the objection, coming from the plaintiff, has no equity in it: if the county might object to the addition to their column, a ratepayer for the year does not appear to have, as such, any interest in the question.

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Judgment.

But the township council appears to have considered the township liable to make good the abatements and losses which might occur in the collection of the tax for the county, overlooking the enactment(a) which expressly exempted them from responsibility to the county for such abatements and losses in respect of the personal estate. The total amount of the county rate was \$3540, and the equalized assessed value of the property in the township was \$380,000. How much was allowed for possible abatements and losses on the assessment of personal estate is not stated, but it is obvious that the addition it would make to the taxes of any ratepayer would be very trifling; and the practical grievance to the ratepayers did not extend beyond this very trifling addition, to get rid of which is the substantial, or, I should rather say, unsubstantial, purpose of the suit.

Though my opinion does not turn on the question, I think it right to say that the addition to the county rate column for the cost of collection for the possible deficiency in respect of the taxes on the lands of the non-residents seems to me to have been an error. I think the allowance should not have been included in that column. The 158th section expressly directed the township to "supply out of the *general funds* of the municipality, any deficiency arising from the non-payment of the tax on land." The amount of the rate in respect of these unpaid taxes on land, being made

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(a) § 158.

good to the county out of the general funds of the township, becomes, as from time to time afterwards realised, part of the general funds, and ceases to constitute or be kept as a separate fund (a).

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The policy of the Legislature appears to have been to guard, as far as possible, the money to be raised in the township, by its municipal authority, for provincial, county, school, and other special purposes, from the control of the township council: these moneys not being raised by their authority, or not going to purposes over which they had jurisdiction.

Accordingly, so far as relates to the county rate, the 76th section of the Act directs the county clerk to certify to the clerk of the township the amount which is to be levied in the township for the county purposes of the year, and requires the latter thereupon to calculate the amount and insert the same in the collector's roll. With this duty the council of the township has, by the statute, nothing to do: it is a statutory obligation which the township clerk owes to the county, and which he is bound to perform even though the council of his township should forbid his doing so. The 89th section points out how the duty is to be performed. The clerk is, on preparing the collector's roll, to "set down in one column, headed 'county rate,' the amount for which the party is chargeable for any sum ordered to be levied by the council of the county for county purposes." The clerk is also to prepare columns, to be headed "special rate," "local rate," "school rate," &c., as the case may require (b). All these directions are to the clerk, and not to the council; and his authority in the matter is derived solely from the statute, in connection with the act of the county council, and not from any act of the council of the township.

Judgment.

(a) See §§ 15 and 159.

(b) §§ 90 and 91.

1867. So, not the council, but the treasurer of the township personally, is directed to pay over to the treasurer of the county the moneys assessed and collected for county purposes<sup>(a)</sup>; though the corporation of the township is responsible for them<sup>(b)</sup>.

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The Court of Queen's Bench, in *Fletcher v. The Township of Euphrasia*<sup>(c)</sup>, intimated an opinion in accordance with this view, though the point was not expressly decided; but it is now suggested that the 11th section of the Assessment Act, as explained by the Interpretation Act, sanctions what was done here. That section directs every local municipality, in the estimates of the year, to make "due allowance for the cost of collection, and for the abatements and losses which may occur in the collection of the tax, and for taxes on the lands of non-residents, which may not be collected;" but says nothing as to the column in which the allowance is to be entered; and contains not a word, so far as I perceive, qualifying or throwing light upon the other sections to which I have referred; and I think it sufficiently apparent, from these and other sections of the Act, that it is contrary to the intention and policy of the Legislature that the township should mix up, in the "county rate" column, money of which they are to have the control, with the money levied for the county.

But, assuming the by-law to be invalid, does it follow that the plaintiff is entitled to relief against it in this Court?

The questions he raises are legal, and not equitable questions; and the only ground on which he claims the right of transferring the determination of them to this Court is, to avoid a multiplicity of suits at law between

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(a) § 189. (b) § 188, see also § 186. (c) 18 U. C. Q. B. 129.

the corporation of the township and the ratepayers, on whose behalf, as well as himself, the plaintiff professes to sue ; but in every case that I am aware of, in which a suit in equity has been entertained on that ground, there was no corresponding or adequate remedy at law. But here the remedy at law, as provided by the Legislature, is more speedy, convenient, and inexpensive, than a suit here can possibly be ; and the question of the validity of the resolution or by-law could have been tried quite as efficiently by that means as by any other. Except for the time which had elapsed after the act the plaintiff complains of, before he had made up his mind to litigate the matter—five months—he would, I presume, have applied at law ; and it is impossible for us to hold that, when, by the rules which the Courts of law have laid down for the regulation of the discretion which belongs to the exercise of their summary jurisdiction in such matters(a), it is too late to apply at law, a remedy is always open to discontented parties here. In such cases delay should no more be disregarded here than at law. The same reasons of convenience and equity apply on this point in both jurisdictions.

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Judgment.

It is manifest that for this Court to interfere now, and give the plaintiff the decree he desires, would create great confusion and inconvenience, and probably considerable loss to the township and the ratepayers generally ; and, considering the trifling amount of the over-tax of any ratepayer for the year, in respect of which alone the plaintiff complains, that no question of permanent right is pretended to be involved ; the sufficiency of

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(a) Standley v. The Municipality of Vespra and Sunnidale, 17 U. C. Q. B., 69 ; Hill v. The Municipality of Tecumseth, 6 U. C. C. P., 29 ; Cotter v. The Municipality of Darlington, 11 U. C. C. P., 265 ; Walton v. The Corporation of North Monaghan, 13 Ib. 401 ; Re Secord and The Corporation of Lincoln, 24 U. C. Q. B., 142 ; Re Forester and The Corporation of the Township of Ross, Ib. 589.

1867. the remedy at law; the delay of the plaintiff till it became too late to apply to quash the resolution or by-law by the method provided by statute; and the impossibility of giving now preventive relief to the plaintiff and other ratepayers—I am clear that the authorities do not require us to make, and would not warrant our making, a decree in favour of the plaintiff.

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Judgment.

An unsuccessful application was made to my brother *Spragge* on the 9th of April, 1866, for an interim injunction; and the reasons for not interfering at the hearing are stronger than they were against granting an interim injunction. My brother *Spragge's* reference to *Carroll v. Perth* must be read in view of the actual circumstances of the present case, and is not to be understood as intended to lay down a general rule that the Court cannot or should not give relief at the hearing in respect of illegal by-laws, though an interlocutory injunction would not be, or was not, granted; or that in such cases the right to an interlocutory injunction is always a reliable test as to the right to ultimate relief in the suit; for there are no doubt many cases in which the Court would be bound to relieve, and in which an interlocutory injunction would be impossible (*a*); just as a Court of law may refuse to quash, though of opinion that in an action the invalidity of the by-law may subsequently be set up with effect (*b*).

I think the decree should be affirmed with costs.

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(*a*) Vide *Blaikie v. Staples*, 13 Gr. 67.

(*b*) Vide *Re Secord and the Corporation of Lincoln*, 24 U. C. Q. B. 142; *Municipality of East Nissouri v. Norseman*; 16 *ib.* 576.

1867.

## DAVIS V. KENNEDY.

*Trade marks, similarity of—Injunction—Account of profits—Rights of alien friends—Patent medicine.*

Plaintiffs sold liquid medicine put up in bottles, labelled "Perry Davis's Vegetable Painkiller." Defendant subsequently sold a similar kind of medicine put up in bottles, labelled "The Great Home Remedy Kennedy's Painkiller." Plaintiffs claimed the word "Painkiller" alone as their trade mark. It was proved that the medicine of plaintiffs was known and sold in the market by the name of "Painkiller," before the defendant's was introduced, and that the trade would not be deceived by the defendant's labels, although the general public might be deceived. An injunction was granted restraining the use by the defendant of the word "Painkiller" as a trademark, with account of profits and costs.

The right at common law of an alien friend in respect to trade marks, stands on the same ground as that of a subject.

The plaintiffs' bill stated that their father, *Perry Davis*, in the winter of the years 1839 and 40, invented in Taunton, Massachusetts, a medicine which he called "Painkiller," and which was put up in bottles on which, and on the wrappers of which, the word "Painkiller" was conspicuously printed; that this medicine had ever since been called and sold as "Painkiller;" that *Perry Davis* invented the word "Painkiller," and first used it as a trade mark; that the medicine had acquired great sale, and the trade mark was of great value, and that the medicine was known in the market by the name of "Painkiller." The bill further set forth that *Perry Davis* had died in the United States, intestate, in 1862; that the plaintiffs and the widow of *Perry Davis* were his next of kin; that the widow assigned her right in half the interest in said trade mark to the plaintiffs; that *Edmund Davis* had, in the life time of *Perry Davis*, acquired the other half from him, and that upon these facts they, according to the laws of the United States, were now the sole owners of the trade mark. The bill charged the defendant

Statement.

1867. with having fraudulently used the plaintiffs' trade mark "Painkiller," by applying it to the wrappers of bottles containing a medicine made by him in such a manner as to deceive the public, and that the defendant had large quantities of the imitation labels in his possession, which he intended using for the purposes above stated, and the prayer was for an injunction, account of profits, and for the destruction of the labels in existence. The bill also stated that the plaintiffs claimed the trade mark under the Canadian Statute 24 Vic., ch. 21, (1861), but as the case was decided on the common law, irrespective of the statute, it is not deemed necessary further to allude to this or to the answer setting up that the registration was not properly made, or the arguments on this branch of the case.

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The answer denied that *Perry Davis* was the first inventor of the word "Painkiller," or first used it as a trade mark, and that the medicine of the plaintiffs was known to the trade or public by the name of "Painkiller," or would be supplied by that name alone; that the words "Painkiller" were never used alone to designate Plaintiffs' medicine, but that it had always been designated "*Perry Davis's* Vegetable Painkiller;" that prior to the introduction of the plaintiffs' medicine into Canada, medicine of a similar kind had been introduced and sold by others (not including the defendant) under the name of "Painkiller."

Statement.

An application for an interim injunction was made before V. C. *Mowat*, on the 11th February, 1867, which was resisted by the defendant on the merits, and on the ground of delay when the facts on both sides were brought out substantially to the same effect as on the hearing; the case was argued at considerable length, and on defendant giving the usual undertaking to keep an account, no order for injunction was made, and the costs of the motion were made costs in the cause.

Issue was joined, and the cause heard, before V. C. 1867.  
*Spragge*, at Hamilton, on the 16th and 17th May, 1867.

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*Kennedy*.

The plaintiffs called *Job B. French*, of Fall River, Massachusetts, who stated that he knew *Perry Davis*, the father of the plaintiffs, since 1828; that he had bought "Painkiller," from *Davis* in 1840 or 1841; the earliest record he found in his books of dealing with *Davis* in the article was in 1842, but he knew from this entry that he had dealt in Painkiller prior to 1842; he never heard of "Painkiller" before *Davis* sold him this medicine, and believed *Davis* was the first inventor of the name and medicine: had dealt in the medicine ever since. It was known to the trade and public simply as "Painkiller," and would be supplied by that name either on a wholesale order, or by retail over the counter: at first, the word "Painkiller" was written or printed on the bottle, which was then a small octagon bottle, afterwards the label was printed "*Perry Davis & Son* Vegetable Painkiller," "*Perry Davis & Son*" being on the one side of the bottle, "Vegetable" on the other, and "Painkiller" largely displayed on the other, the fourth side being blank. "Painkiller" was the word which in his opinion was the trade mark, and gave the value. The medicine was almost always ordered as "Painkiller" simply; that was what *Perry Davis* always called it, and he was particular as to that name. The bottle containing the defendant's medicine was then given to the witness, it is a larger bottle than that of the plaintiffs for the same price, but plaintiffs have more sizes of bottles than one, some larger than the defendant's. Defendant sells two sizes; the defendant's wrapper is blank on three sides, on the other side it has a likeness of the defendant, and the words, "The Great Home Remedy, *Kennedy's* Painkiller," the word "Painkiller" being the most prominently displayed; the bottle itself is plain, but it is completely hidden by the wrapper;

Statement.

1867. the witness then stated that no one in the trade would be deceived, and no one with the two bottles in his hands could possibly be deceived by the defendant's bottle, but that, nevertheless, the defendant's bottle was calculated to deceive the general public, because they would buy anything that had the name of "Painkiller" prominently displayed on it; many persons only heard the name "Painkiller," without knowing who made it, and, consequently, *Kennedy's* name being on the bottle was no protection or notice to them; by "Painkiller" the medicine of the plaintiffs, and that only was meant.

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Statement. Evidence substantially similar to this was given by many druggists, residents of Boston, New York, and Providence, R. I. Druggists in Canada were also called, who proved the introduction into Canada of the plaintiffs' medicine in or about 1850; that for years it was the only "Painkiller" in the market; that lately others had sprung up, and since then each "Painkiller" was generally asked for by the name of the maker, but the witnesses all stated that if "Painkiller" alone was asked for the plaintiffs' was that which was meant, and would be supplied without further designation; that more of the plaintiffs' was sold than of all the others put together, and that without the words "Painkiller" defendant's medicine would not be sold in any considerable quantity.

Evidence was also given that other "Painkiller" had been in the market after plaintiffs' acquired celebrity, but all these had been discontinued; some after litigation, others on being threatened with proceedings; that plaintiffs' throughout maintained its place in the market, and, was now in more extensive use than ever. The plaintiffs also put in evidence depositions taken in the United States under a commission, to the same effect as that before stated, and establishing their right to *Perry Davis's* interest in the trade mark. They then called the defen-

dant to put in the account directed to be kept; this the defendant's counsel objected to do, and the Court sustained the objection. He was then asked how he first heard of the name of "Painkiller," and when he first used the name? His counsel objected to these questions as tending to expose defendant to penalties and criminal proceedings under the trade mark act of 1861. On plaintiffs' confining the questions to facts occurring more than twelve months before the period of examination—(See 24 Vic., ch. 21, sec. 22)—these questions were allowed, and the defendant then stated that he first took the name from the plaintiffs' medicine; so far as he of his own knowledge knew, it was the first "Painkiller" introduced into Canada, though he believed *Perry Davis*, of Hamilton first invented the name; he stated that "Painkiller" was a very valuable name, and that he would not willingly take it off his bottles; though not more valuable than the "Great Home Remedy."

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Defendant then called witnesses to establish the invention of the name "Painkiller," and use of it as a trade mark by *Perry Davis* of Hamilton; but as the Court held the evidence failed to establish this fact no further reference to this point is deemed necessary.

The other evidence given is noticed sufficiently in the judgment.

Defendant also called several witnesses to establish the prior introduction and sale of "Painkiller" in Canada by others than the plaintiffs, but, in the opinion of the Court, failed to make out the case; his witnesses stated that whenever "Painkiller" was asked for, they always asked "What 'Painkiller' do you want?" giving the names of the various inventors; if the party named any one he got it, if not they gave which ever they liked; they made less selling the plaintiffs' than any other "Painkiller;" there was no intention to defraud

1867. on their part, or on *Kennedy's*, so far as they knew.

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*Kennedy* always asserted that he was selling his own composition.

Argument.

Mr. *Blake*, Q. C., and Mr. *Edward Martin*, for the plaintiffs. The word "Painkiller" alone designates the medicine of the plaintiffs, the other words are not claimed as part of the trade mark, and are of no value, and this is the case made by the bill. It is no answer that the trade, or a person with the two bottles in his hands will not be deceived, *Seixo v. Provezende* (a). It is sufficient if any portion of the public are likely to be deceived; the fact that *Kennedy's* name appears on his label, with the words "The Great Home Remedy," is no answer: the use of the word "Painkiller," prominently displayed as it is in this case, is proved to be sufficient to enable the defendant's medicine to be sold as that of the plaintiffs, and so injure the plaintiffs, and deceive the general public, *Harrison v. Taylor* (b), *Glenny v. Smith* (c). The name or word "Painkiller" is a good trade mark, *McAndrew v. Bassett* (d), *Crawford v. Shuttock* (e). Protection will be extended to foreigners in the same way as to subjects, *Collins Co. v. Brown* (f), *Collins Co. v. Cowan* (g); that protection has been extended to proprietors of patent medicines, *Holloway v. Holloway* (h). Counsel also referred to *Franks v. Weaver* (i), *Sykes v. Sykes* (j), *Hunt v. Maniere* (k), *Millington v. Fox* (l).

Mr. *Proudfoot* for defendant, contended that plaintiffs did not come into Court with clean hands; it was impossible that their medicine could cure all the diseases

(a) 1 L. R. Chy. App 192

(c) 11 L. J. N. S. 964.

(e) Ante, 149.

(g) 3 K. & J. 429.

(i) 10 Beav. 297.

(k) 34 L. J. N. S. 142.

(b) 11 L. J. N. S. 408.

(d) 33 L. J. C. 567.

(f) 3 K. & J. 423.

(h) 13 Beav. 209.

(j) 3 B. & C. 542.

(l) 3 M. & C. 338.

it professed to be a remedy for ; this misrepresentation disentitled them to any relief, *Perry v. Truefitt* (a), *Pidding v. How* (b). No fraud was made out against defendant, and no similarity in the bottles or marks. That the word "Painkiller" was descriptive of quality, and was in its nature incapable of being a trade mark (c).

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That plaintiffs had failed to establish their right to the trade mark "Painkiller," if they had a right to any trade mark it was "*Perry Davis's Vegetable Painkiller.*" Counsel also referred to *Farina v. Silverlock* (d), *Welch v. Knott* (e), *Burgess v. Burgess* (f) *Eldeston v. Vick* (g), *Blanchard v. Hill* (h), *Hall v. Burrowes*, (i), *Leather Cloth Co. v. American Leather Cloth Co.* (j), and commented on the cases cited by the plaintiff.

SPRAGGE, V.C.—It appears in evidence that in the year 1840 or 41 one *Perry Davis*, under whom the plaintiffs claim, and who was then a resident in Trenton, in the United States of America, compounded a liquid medicine, which he put up in bottles, and to which he gave the name of "*Perry Davis's Painkiller*;" and which he then and has since sold in considerable quantities. The plaintiffs claim that the word "Painkiller" is their trade mark, and file their bill to restrain the use of it by the defendant. Judgment.

They base their right upon the Trade Mark Act (1861), and also upon the common law. Their right under the act may be questionable, as the declaration produced is not made by the proprietor, as required by the Act, but by a person describing himself merely as acting on behalf of *Perry Davis & Son*. Their right at common

(a) 6 Beav. 73.

(c) 2 Story, Eq. Jur. 912

(e) 4 K. & J. 707.

(g) 11 Hare, 78; 18 Jur. 7.

(i) 9 L. T. N. S. 561; 10 J. N. S.

(b) 8 Sim. 477.

(d) 6 D. M. & G. 214.

(f) 3 D. M. & G. 896.

(h) 2 Atk. 484.

(j) 11 J. N. S. 513.

1867. law, however, seems to be clear, the right of an alien friend standing upon the same footing as that of a subject. The point was raised in *The Collins Company v. Brown* and *The Collins Company v. Cowan*, and the right expressly affirmed in the latter case most explicitly.

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Kennedy.

Judgment.

The defendant's Counsel contend that what the plaintiffs call a trade mark is not properly a trademark, but a term of description of the article which they prepare. I do not agree in this. I take the word to fall within the class of trade marks usually called fancy names or "trade marks," which are arbitrarily selected by an inventor or manufacturer to catch the eye or ear of the public and to distinguish his article from others of the like nature. It is true that the term "painkiller" is suggestive of the use of the medicine, but it is not an adjective nor is it used adjectively. It is a quaint combination of words, never probably used together before, forming a name by which the inventor desired that his preparation should be known, and calculated, as he rightly judged, from its quaintness to fix itself in the memory of the general public. In *McAndrews v. Bassett* Sir W. Page Wood held that the word "Anatolia," impressed by a particular manufacturer of liquorice upon the liquorice manufactured by him, was a trade mark to be protected by the Court: although juice from which liquorice is made is imported from Anatolia. It was argued for the defendant that the word "Anatolia" simply denoted the place from which the liquorice came, and that any manufacturer had a right to stamp on his goods the name of the place whence they came, and there seemed a good deal in the argument; but the learned Vice Chancellor after giving the matter a good deal of consideration, held the plaintiffs entitled to an injunction. He put the matter thus, that although the juice had come from Anatolia long before, yet until the plaintiffs set up the manufacture and thought fit to have a new name for the article they were thus introducing,

nobody thought of using the name "Anatolia," and it was not wanted for the trade. Upon appeal before Lord *Westbury* he came to the same conclusion, expressing himself thus: "Property in the word ('Anatolia') for all purposes cannot exist, but property in that word as applied by way of stamp upon a stick of liquorice does exist, the moment the liquorice goes into the market so stamped, and obtains acceptance and reputation in the market, whereby the stamp gets currency as an indication of superior quality, or of some other circumstances that render the article so stamped acceptable to the public."

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Every word of this is applicable to the case before me. In the case cited the manufacturer did not mean to denote simply that his liquorice was made from juice brought from Anatolia, but that he chose to designate the liquorice made by him by that name in the market; and so in the case before me, the manufacturer did not mean to indicate simply that his preparation was an alleviator or remover of pain, but that he chose to designate it by an odd and entirely new phrase, that it might be known by that name in the market. He thought it attractive, no doubt, and a sort of catchword that could be remembered, and he intended it not merely as descriptive, but as a distinctive name by which his preparation should be known. Judgment.

The next question is, whether *Perry Davis* was the first to use the term "Painkiller" as the name of a medicine. Upon this point there is a great deal of evidence that although the term came to be applied to some twelve or fifteen preparations by different persons, *Davis* was the first to use it. He was indeed the inventor of the term as well as of the medicine. It is attempted to be shewn that the term was first used by a person of the same name, resident in Dundas and afterwards in Hamilton. What is proved is, that the

1867. man sold a mixture under that name, and it is not clear that he sold more than one bottle of it. It bore a general resemblance to one of the bottles in which the *Davis*, under whom the plaintiffs claim, sold his medicine. As to the time, some witnesses say that he went to the United States in 1840, having lived in Canada for some years previously; and the evidence is that he sold the medicine some four years before he left. If this were correct it would give the priority of the term "Painkiller," as applied to a medicine, to the *Perry Davis* who lived in Canada. It appears from the evidence that this was a different person from the one under whom the plaintiffs claim.

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Upon the question of date, however, there is a difference in the evidence. The witnesses who speak of his leaving Canada, in 1841, speak only from memory; and mention no circumstance by which they fix the date.

Judgment. On the other hand, we have the evidence of a medical practitioner that he attended him and his family regularly in 1846, 7, and 8, and that he left Canada in the spring of 1849. If the evidence of the doctor is more to be relied upon (and I think it is, for he speaks from entries in his books), the sale of the "Painkiller" by this man in Canada must have been some three or four years after its introduction into the States by his namesake.

I come now to the principal question in the cause, viz., whether the defendant has infringed the plaintiffs' trade mark. He has been for several years the manufacturer and vender of a preparation to which he ascribes many of the virtues which are claimed for the plaintiffs, and to which he has given the designation "Painkiller." If he had used that designation alone it would be a flagrant infringement of the plaintiffs' right. But it is contended that the words are so used as not to mislead purchasers. The defendant's article is spoken of by

druggists in Hamilton, as first known in the trade within the last five years. The defendant says he made it, and advertized it in a local paper (in Dundas) some years before. It is evident that it was obscurely known until the later date. But even at the earlier date the plaintiffs' article had obtained a great reputation, and a very large sale, under the name of the "Painkiller," sometimes with, sometimes without the prefix of the name of the maker.

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Differences are pointed out between the appearance of the bottles, and the labels, in which respectively the article of the plaintiffs and that of the defendant are sold. To the eye there is an obvious difference, when the two are seen together, and they are not called by the same name: the plaintiffs' article being called "*Perry Davis's Vegetable Painkiller*," while the defendant's is called "*The Great Home Remedy, Kennedy's Painkiller*."

Judgment.

The gravamen of the complaint is of course the use of the word "Painkiller." If the other words used would neutralize the use of this word so that customers would not purchase the defendant's article under the idea that they were purchasing the article which had been extensively known under the name of "Painkiller," before the introduction of the defendant's, the plaintiffs would have nothing to complain of. But the contrary is demonstrated by the evidence to be the fact. It is proved that the plaintiffs' article was frequently asked for even by persons in the trade by the name of "Painkiller" simply; that the same was the case very generally with ordinary customers, particularly before the introduction of articles by the name of "Painkiller," made by other manufacturers; that many ask for the Painkiller in ignorance of there being more than one article known by that name; that it is the practice of some dealers, when asked generally for the Painkiller,

1867. to inquire of the customers *which* "Painkiller" they want; and the dealer is sometimes asked in return which he recommends. A certain consequence of all this must be, that articles other than the plaintiffs' are sold under the name of Painkiller, when if their medicine alone bore that designation it would be their medicine alone that would be sold, and this is proved as a fact by the varying of the quantity of this medicine sold in Canada, according to the prevalence in the market of other medicines called "Painkiller."

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Judgment.

Since the introduction of other articles of the same name, the trade who wish for the plaintiffs' article ask for it with the prefix of the name of the maker, and many private customers do the same. But, again, there are many private customers who do not; and it is sufficient for the plaintiffs' case if a class of purchasers or any considerable number of a class are misled by the defendant's use of the term "Painkiller" to purchase his article when otherwise they would purchase the plaintiffs. In *Harrison v. Taylor* (a) Vice Chancellor Wood speaks of "the trade" and ordinary purchasers, many of them "illiterate," as "parallel streams of customers," and Sir *Richard Kindersley*, in *Glenny v. Smith*, uses this apposite language, "It is not the question whether the public generally, or even a majority of them, is likely to be misled; but whether the unwary, the heedless, the incautious portion of the public would be likely to be misled, and I think that not a very inconsiderable portion of the public may safely be so described;" and with this agrees the evidence of a practical man, very well acquainted with the subject of which he was speaking; Mr. *Radway*, the proprietor of "*Radway's Ready Relief*." "Thousands of persons," he says, "buy patent medicines without examining particularly what they buy;" and, after say-

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(a) 11 Jur. N. S. 408.

ing that a person understanding what he was buying could not be deceived by the defendant's bottle, as it does not resemble the plaintiffs', yet adds, "Many persons might go into shops who had heard of a Painkiller, and who would purchase *Kennedy's* preparation because of its having that name, and who would not purchase it otherwise." I think it proved to a demonstration, that in many instances, it is not too much to say, in a vast number of instances, the defendant's article has been purchased because it bore the name of "Painkiller," when but for its bearing that name it would have been the plaintiffs' article that would have been sold. It was I think emphatically the word "Painkiller" that was the distinctive mark, but taking its whole title to be the trade mark, the appropriation of the term "Painkiller" would be an infringement. It is proved by the concurrent testimony of a number of witnesses that the right to the use of the term "Painkiller" was a right of great value, and all the circumstances of the case tend to that conclusion. Judgment.

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The defendant makes this further objection to the plaintiffs' suit, that they do not come into Court with clean hands, that they claim for their preparation virtues in the cure of almost all diseases internal and external, and in that way attempt to palm off their article upon the public as a universal specific, which it is not, and cannot be. The same objection was made in *Holloway v. Holloway*, the defendant's counsel contending that the plaintiff had disentitled himself to the assistance of the Court by what he styled the deceit he had attempted to practice on the public; that he had represented that his pills and ointment would cure all diseases in the world, and *Pidding v. How*, the well known *Howqua's* mixture case (a) and *Perry v. Truefitt* (b), were referred

(a) 8 Sim. 499.

(b) 6 Beav. 66.

1867. to. But Lord *Langdale* granted the relief prayed for. In the report of the case the distinction between the cases cited and the case before the Court is not pointed out, but I think there is this plain distinction: in each of the cases cited there was a specific false representation of an alleged fact—in the one case as to a tea being grown in a particular district of China, and as to the mode in which it was procured, and made up; in the other case, as to what the report calls a greasy composition for the hair, the recipe for which had been purchased from one *Leathart*; that it was “made from an original receipe of the learned *J. H. Von Bluemanbach*, and was recently presented to the proprietor by a near relation of that illustrious physiologist,” each of these statements was a sheer fabrication; a thing differing greatly in character from a mere exaggeration of the virtues, which the inventor of a patent medicine chooses to apply to his article.

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**Judgment.** I have not thought it necessary to go through the cases on the law of trade marks, which is now well understood: the application of it to particular cases is the difficulty. I will refer only to the language of Lord *Cranworth* in *Farina v. Silverlock*, it is peculiarly apposite to the case before me, “Judges may occasionally have erred in the application of the law to particular facts, but I apprehend that the law is perfectly clear, that any one who has adopted a particular mode of designating his particular manufacture, has a right to say, not that other persons shall not sell exactly the same article, better or worse, or an article looking exactly like it, but that they shall not sell it in such a way as to steal (so to call it) his trade mark, and make purchasers believe that it is the manufacture to which that trade mark was originally applied.”

The practice of appropriating the trade marks of others has been reprobated by various Judges, and I

have no doubt that Lord *Cranworth* used the word “steal” to mark his sense of its gross impropriety. In the *Collins Company v. Cowan* Sir *W. Page Wood* took occasion to characterize it in language not more severe than just. “I cannot conceive,” he said, “of anything short of an indictable offence, more discreditable than this course of proceeding.”

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The plaintiffs are entitled to an injunction in the terms prayed by their bill, and to an account as prayed.

The decree will be with costs.

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MITCHELTREE V. IRWIN.

*Vendor and purchaser—Possession and other acts by purchaser—Waiver of inquiry as to title.*

A purchaser before the time appointed for the completion of a contract for the sale of land, and while the investigation was in progress went upon and cleared a portion (about two or three acres,) of the land sold, and sowed the same with turnip seed which it was necessary to do at the time or lose the whole season; he did not, however, harvest the crop, but abandoned the possession entirely, in consequence of objections to the title not being removed: *Held*, no waiver of the purchaser's right of an inquiry as to title.

This was a suit by *John Mitcheltree* against *Robert Irwin*, for the specific performance of an agreement for the sale by the plaintiff to the defendant of the north-west part of lot No. 35, in the seventh concession of the township of St. Vincent. Statement.

The bill contained various allegations as to acts done by the defendant, which deprived him of his right to a reference as to title. It was stated that the plaintiff executed a conveyance of the lot, but retained the same in his possession until a mortgage should be executed

1867. by the defendant, a stipulation contained in the contract. It was alleged that the defendant refused to execute this mortgage; that he obtained possession of the plaintiff's trunk which contained the conveyance to himself; that without the plaintiff's consent the defendant opened this trunk, abstracted the conveyance, and registered the same. The bill also alleged that subsequent to the agreement for sale the defendant went into possession of the land, being aware of the objections to the title thereto, and that he continued in possession of the land, a portion of which he cleared and cultivated.

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The defendant by his answer explained the circumstances under which he had opened the trunk and abstracted and put on record the conveyance; the plaintiff having threatened to ignore the agreement and make a conveyance to another person and then leave the Province. That before opening the trunk he declared in writing his intention of doing so in the presence of witnesses, and this declaration was subscribed by him and attested. As to the possession he stated in his answer as follows: "At the time of my entering into the contract with the said plaintiff it happened to be just the right season for clearing up a piece of the said land, in the said contract mentioned, of about two or three acres, and which said piece of land was suitable for turnips, and the said plaintiff assured me that it would take some time to evidence his title to the said land by furnishing me with the abstract thereof, and producing the title deeds relating thereto; and he advised me that as it was the right season, and I should lose it by the delay, that I had better go on the land and clean it up for the purpose aforesaid, and that in the meantime he would evidence his title according to the said contract. Acting upon his positive assurance that he had a title thereto free from all incumbrances, and that he would evidence the same to me without delay, and not anticipating any difficulty in respect thereof,

and relying upon his statements in the premises, and that he had a title to the said land free from all incumbrances, and would without delay properly evidence the same, and in good faith I entered upon the said land, and cleaned up about two or three acres, and sowed the same with turnips; but the difficulty about the title having occurred almost immediately thereafter, I did not harvest the said crop, but forthwith abandoned the same and all possession, and occupation of the said land.”

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The defendant submitted to perform the contract on a good title being shewn, and asked a reference. The case came on for examination of witnesses and hearing at the sittings of the Court at Owen Sound, in the Spring of 1867.

Mr. *George Murray*, for the plaintiff.

Mr. *Snelling*, for the defendant.

*Clive v. Beaumont (a)*, *Gaston v. Frankum (b)*, *Blacklow v. Laws (c)*, *Bentley v. Craven (d)*, *Burroughs v. Oakley (e)*, *Duncan v. Cafe (f)*, *Hook v. McQueen (g)*, *O'Keefe v. Taylor (h)*, *Morin v. Wilkinson (i)*, *Crooks v. Glenn (j)*, *The Commercial Bank v. McConnell (k)*, were referred to.

SPRAGGE, V. C.—The bill is filed by the vendor of real estate, fifty acres of farm land, against the purchaser for specific performance. The only question is whether the defendant is entitled to the usual inquiry

Judgment.

(a) 1 DeG. & S. 397.

(c) 2 Hare, 40.

(e) 3 Swan. 159.

(g) 2 Grant, 309.

(i) 2 Grant, 157.

(b) 2 DeG. & S. 561.

(d) 17 Beav. 204.

(f) 2 Mee. & W. 244.

(h) 2 Grant, 305.

(j) 8 Grant, 239, 242.

(k) 7 Grant, 326.

1867. as to title. The plaintiff contended that the defendant had waived such inquiry on various grounds, all of which I decided in favor of the defendant except one—the taking possession and actual use by the defendant of a portion of the land contracted to be sold, and which, the plaintiff contended, was a taking possession of the whole.

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The contract of sale is dated the 8th of May, 1866; the purchase money was \$600; of which \$100 was to be paid in hand as the agreement says, viz: \$20 which the agreement admits was then paid, and \$80 at the signing of the deed, which was to be given with “a good and sufficient title, clear of all incumbrances whatever,” by the 1st of the month following; and a mortgage was to be given for the balance of the purchase money; payable by instalments of \$50 a year.

Judgment. At the hearing I said I thought that the execution of the conveyance was not a waiver of title. It is evident from the bill that it and the preparation of the mortgage were only provisional. What *Irwin* said in relation to the mortgage was clearly no waiver. That as to the abstraction of the conveyance and its registration, it would by itself be strong evidence of waiver, but taken in connection with the circumstances, the previous threat of the plaintiff and the written memorandum by which the defendant guarded himself against such an interpretation of his act, I thought the intention of the waiver was negatived.

This allegation of waiver of title by possession taken was not in the original bill, though other acts of alleged waiver, were. In his answer the defendant gave explanations, which he has sufficiently supported by evidence; and he set out certain specific objections to the title. The plaintiff then by amendment introduced his allegation as to possession; he charges, “that the said defendant has gone into possession of the said land since the

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said agreement was made, being aware of all the objections, or pretended objections, to the title," and that he has since continued in possession, and cleared and cultivated, and improved a portion thereof. The defendant's explanation is in substance this, that there was a piece of the land of two or three acres suitable for turnips, and which required to be "cleaned up" for the purpose; that the time was suitable, and that if he delayed, it would be too late; that he did clean up this patch of ground, and sowed it with turnip seed, but did not harvest the same, but abandoned his possession of it; and, so far, his explanation is supported by evidence; the witness who proves it stating that the taking possession was before June, consequently before the time fixed for the completion of the contract. The defendant's explanation in his answer further is, that he took this possession by the advice of his vendor, who said that he would be able to clear up the difficulties made by the defendant as to the title, but that it would take some time; and that the time for cleaning up this piece of land and putting in turnips would be lost for the season; this however, is not proved. The objections taken to the title, or rather to the evidence of title, were very reasonable, and there is no doubt that the defendant was a willing purchaser, anxious to keep his purchase. No Solicitor appears to have been employed by either of the parties.

Judgment.

I have come to the conclusion that the purchaser has not disentitled himself to his ordinary right to have an inquiry as to his vendor's title. It should be borne in mind that contracts of sale, investigations of title, and conveyances, are not in this country conducted as a general rule with the same care and solemnity, or through the intervention of a Solicitor, as is the case in England; and it would often be a mistake to attribute to an act done by a vendor or purchaser here, the same intention as is properly attributable to the like act in England; and it would consequently often operate unjustly to visit it with the same consequences.

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The mere taking possession by a purchaser is not necessarily a waiver of the right to an inquiry as to title. The Court will not hold it to be so unless satisfied that it was the intention of the purchaser to take the land without such inquiry; or without its being made to appear that the conduct of the purchaser has been such that it would be unjust to the vendor, under the circumstances, to put him to prove his title. Now there is not a single point in the circumstances, under which possession was taken in this case to lead me think that it was the intention of the purchaser, or that the vendor thought it was, to waive the inquiry as to title. I am satisfied that neither party had any such idea.

Judgment. In *Burroughs v. Oakley* (a) possession had been taken by the purchaser, and it was held that the inquiry as to title was not waived. There was indeed in that case a feature which does not exist in this, viz: that investigations into title were proceeded with between the parties after possession taken. The question was a good deal gone into by the Master of the Rolls, Sir *Thomas Plumer*, and his observations are apposite to the case before me. Speaking of the possession taken he says, "possession is taken; in what circumstances the Court is not apprized, but it must be presumed to have been taken with the concurrence of the vendor; there is no proof that it was contrary to his wishes, or accompanied by an obligation on the vendee to waive any right." So little weight did the vendor in the case before me attach to the circumstance, that in his original bill, while setting forth several grounds upon which he charged that the purchaser had waived the inquiry, he omitted the taking of possession altogether; and this I think material, because if it had been understood by the parties as manifesting an intention on the part of the purchaser to waive the inquiry, the vendor would

scarcely have omitted it, when stating the grounds upon which he conceived the inquiry to be waived. 1867.

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The inclination of the Court always is to sustain the right of the purchaser to have a good title made out. Sir *Thomas Plumer* calls it "an ordinary equity which the Court is particularly careful to enforce, on the plain principle that a plaintiff seeking to compel a purchaser to accept an estate is bound to submit his title to such a scrutiny as satisfies the Court that the defendant may safely part with his money." In another place the same learned Judge says, "In proceeding to consider the effect of the evidence, a Court of Equity called on to enforce specific performance of an agreement for the conveyance of an estate to one party, and payment of the purchase money to the other, must feel anxiety to protect the purchaser and give to him reasonable security for his title; not compelling him to take a title without knowing whether it is good or bad." And he adds, weighing the very different consequences to the vendor and purchaser of granting or refusing the inquiry. "The vendor, if his title is good, suffers only the temporary inconvenience of delay; but the vendee, if it is bad, may sustain a severe loss. The inclination of the Court therefore is in favor of the vendee; and a vendor claiming to be excepted from the general rule is required clearly to establish a case of exception." I will add one other quotation from the same clear and able judgment: "The decisions in *Fleetwood v. Green*, and the other cases cited, are founded not so much in a rule of equity limiting a time within which objections must be taken, and visiting delay with punishment, as on a conclusion of fact, the Court being satisfied that the purchaser intended to waive, and has actually waived his right of examining the title. When the Court is convinced that that is the just conclusion from the facts of the case, then, and then only is it authorized in denying to the purchaser his ordinary equitable right."

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I have thought it well to give these quotations from the judgment of Sir *Thomas Plumer*, because they are a clear exposition of the law upon a point that it is desirable should be well understood in this country; as well as because they are apposite to the case before me. I am satisfied that in this case the defendant did not, in taking possession as he did, intend to waive the inquiry as to title; which, according to the plaintiff's own account, had then been in progress: and I am also satisfied that the plaintiff had no idea that possession was taken with any such intention, or that it would have any such consequence. It is not suggested that it would be unjust to the vendor to grant the usual inquiry: I think it would be unjust to the purchaser to refuse it to him. There will be the usual reference as to title.

The defendant is entitled to his costs up to the hearing. His answer was necessary to meet the plaintiff's case, of waiver of inquiry as to title; and the costs from thence to the hearing have been occasioned by the same cause. Subsequent costs will as usual be reserved.

### BROGDIN V. THE BANK OF UPPER CANADA.

*Parties—Ratepayer—One suing on behalf of himself and all other ratepayers.*

A municipal corporation after raising money on the credit of the Municipal Loan Fund for a purpose specified in the by-law, passed another by-law diverting the debentures to another purpose; and under this second by-law the debentures passed into the hands of the Bank of Upper Canada:

*Held*, that a bill would lie by a ratepayer on behalf of himself and all other ratepayers of the municipality, against the Bank and the municipal corporation, for the restoration of the debentures to the corporation; and a demurrer, on the ground that the Attorney General was not a defendant, was overruled.

Statement.

The bill in this cause was filed by *George Brogdin*,

on behalf of himself and all other ratepayers of the Town of Port Hope, against The Bank of Upper Canada, The Town Council of Port Hope, and The Commissioners of the Port Hope Harbor Company, setting forth that plaintiff was a resident inhabitant and ratepayer of the town ; that on or about the 25th July, 1853, the defendants the Commissioners being unable to complete the harbour agreed with the Corporation of the Town of Port Hope to issue debentures to the extent of £30,000 and hand the same over to the Council to enable the Council to borrow that sum from the Consolidated Municipal Loan Fund, and loan the same to the Commissioners to enable them to pay off the liability incurred by them in acquiring the harbour and towards the construction and completion thereof, and that the said loan should be secured to the municipality of the Town of Port Hope by the harbour debentures, and that all payments to be made by the Commissioners should, from time to time, be paid over to the Treasurer of the municipality of Port Hope, who should, from time to time, as the same should come into his hands, pay over the same to the Receiver-General of the Province to be by him placed to the credit of the said municipality with the Consolidated Municipal Loan Fund. In pursuance of this agreement a by-law (No. 66) having been first duly approved by the rate-payers, was passed by the Municipal Council of Port Hope on or about the 25th day of July, 1853, and which by-law was subsequently duly approved by the Governor in Council.

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Statement.

That in September, 1855, the Commissioners obtained like aid to the extent of £15,000, a by-law (No. 102) authorizing the same having been in like manner duly submitted and approved of by the rate-payers, and passed and subsequently approved of by the Governor in Council.

The bill further alleged that on or about the 16th  
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1867. day of January, 1858, the Municipal Council of Port Hope illegally assumed to pass a by-law (No. 128) in which amongst other things the Council assumed to enact that it should be lawful for the Mayor of the said town for the time being, to advance from time to time as might be necessary, the debentures of the said Commissioners to the Port Hope, Lindsay and Beaverton Railway Company, to enable the said Railway Company to pay off their then liabilities to the former contractors for constructing the road and for carrying into effect an alleged agreement for completing the said road with Messrs. *Tate & Fowler*, and that the said by-law had not been submitted to or approved of by the rate-payers of the said town.

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The plaintiff charged that such by-law was illegal and invalid inasmuch as it assumed to appropriate the said debentures for purposes other than those set forth and stipulated for in by-laws No. 66 and 102, and that the appropriation so made having been made without the assent of the electors, was a breach of trust.

The bill further alleged that in pursuance of such illegal by-law the Mayor, in compliance with a resolution of the Council, had deposited in the Bank of Upper Canada debentures to the extent of £30,000 sterling, and prayed amongst other things that the Bank might be ordered to deliver the said debentures to the Corporation of the Town of Port Hope : and for payment by the Bank of the amount of the debentures and all arrears of interest accrued due.

The Bank of Upper Canada demurred to the bill on several grounds, the one principally relied on being that the Attorney-General should have been made a party to the bill.

Mr. *Hillyard Cameron*, Q. C., for the demurrer.

Mr. A. Crooks, contra.

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*Wilson v. The Corporation of Port Hope (a), Hamilton v. The Desjardins Canal Co. (b), Davidson v. Grange (c), Hare v. The London and North-Western Railway Co. (d)*, were amongst other cases referred to.

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VANKOUGHNET, C.—In this case the plaintiff sues as a ratepayer on behalf of himself and all others the ratepayers of the town of Port Hope to procure restitution from the defendants, the Bank, to the defendants the Town Council of the Town of Port Hope of certain debentures issued by the Harbor Commissioners for the harbor of Port Hope, and by them paid to the Town Council, in security for a loan which was made to them the Commissioners by the Council, to enable them to complete or improve the harbor; and which debentures, the bill alleges, the Town Council have illegally paid away to the Bank of Upper Canada for a purpose totally distinct from that for which they were issued to and received by the Town Council.

Judgment.

The by-law of the Town Council, under which was raised the money which was loaned to the Harbor Commissioners, and to secure the repayment of which the debentures were issued, after reciting that the harbor was incomplete and that it was desirable in the interests of the town that it should be completed, enacts that it should be lawful for the Mayor of Port Hope to borrow £30,000 on the security of the Consolidated Municipal Loan Fund for Upper Canada, and to loan the same to the Commissioners for the harbor; and that such loan should be secured to the municipality of Port Hope by harbor debentures, to be issued under the authority of the act vesting the harbor in Commissioners; and that

(a) 2 Gr. 370.

(b) 1 Gr. 1.

(c) 4 Gr. 377.

(d) 7 Jur. N. S. 1145.

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all payments made by the Commissioners from time to time should be paid over to the Treasurer of the municipality and by him paid over to the Receiver General of the Province, to be placed to the credit of the municipality, with the Consolidated Municipal Loan Fund. This by-law, known as by-law No. 66, was submitted to and adopted by the ratepayers of Port Hope in accordance with the municipal law.

Judgment,

The by-law under which the debentures have been diverted from their original purpose and transferred to the Bank of Upper Canada enacts that it shall be lawful for the Mayor of the Town of Port Hope to advance the said harbor debentures to the Port Hope, Lindsay, and Beaverton Railway Company, or as much thereof as might from time to time be necessary to enable the said railway company to pay off their liabilities to the former contractors with the said railway company. In pursuance of this by-law, a resolution of the Council was passed, authorizing the Mayor to deposit the debentures with the Bank (the defendants), to be disposed of by them, and the proceeds applied to the purposes named as aforesaid in the by-law. This by-law, known as No. 128, was not submitted to the people.

The defendants the Bank demur to this bill upon the three following grounds :

1st. That the plaintiff cannot in his own name file this bill; at all events until he has shewn that the Town Council or Corporation of Port Hope will not prosecute.

2nd. That the Attorney General is a necessary party, inasmuch as the debentures in question, being a security for the repayment of the money obtained on the credit of the Municipal Loan Fund, are liable to make good the debentures issued to the town of Port Hope by the Government on the credit of that fund.

3rd. That the by-law No. 128 did not require a vote of the ratepayers. 1867.

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As regards the first objection, it does seem contrary to good sense that a single ratepayer should be permitted to carry on such a suit as the present without any excuse or reason alleged for his doing so. The transaction complained of here took place in 1858. We know that the Town Council is in its members yearly undergoing or liable to undergo change, and *non constat* that any one of the members composing that body in 1858 is a councillor now, or that the Council as at present composed would not, if applied to, have instituted (as was their duty) proceedings or allowed them in their name, to accomplish the objects the plaintiff is pursuing here. Still, though the Town Council are the proper and ordinary representatives of the community, they have not taken any such steps; and since 1858, these harbor debentures have, without objection on the part of the Council or Corporation of Port Hope, illegally remained in the possession of the Bank, which has been receiving interest upon them. This suit is in fact, by representation, the suit of all the members of the Corporation. In *Davidson v. Grange*, 4 Grant, at page 382, this Court had under consideration the subject of suits framed like the present; and there the Chancellor, in delivering the judgment of the Court, says: "But where the acts complained of are incapable of confirmation (that is, void and not merely voidable) in that case it would seem that the record may be framed in the present form, and that without alleging the existence of any impediment to the use of the corporate name. It would seem certainly, on principle, that suits in like classes of cases should be instituted in the name of the company, unless some impediment is shewn to exist. But Sir James Wigram distinguished *Bagshaw v. The Eastern Union Railway Co.* (a) from *Foss v. Harbottle* upon this very ground;

Judgment.

(a) 7 Hare, 130.

1867. and so many other cases appear to have turned on this distinction that the point must be considered, I apprehend, as settled." That this is so in the case of private or trading corporations the authorities shew; and it does not appear to have been disputed in the recent case of *Hare v. The London and Northern Railway Co.* (a). But the case in this Court to which I have referred was the case of a municipal corporation, whose constitution as to membership the plaintiff impeached; and I therefore feel myself bound, by its authoritative language, to overrule the first objection, although the recent case of *Evans v. The Corporation of Avon* (b) may render it doubtful whether sufficient attention has been paid to the difference between a trading and a municipal corporation.

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Judgment.

I need not say that in deciding this point, I have treated the by-law No. 128 and the transfer of the debentures under it to the Bank as illegal, and that no vote of the ratepayers could have sanctioned it or made it valid as against even one dissentient. And this disposes also of the third ground of demurrer, which in the view I have taken refers to an unimportant objection or statement made in the bill.

As to the second ground of demurrer, I have had more difficulty, and for some time was inclined to think the Attorney General a necessary as he would be a proper party to the bill. Sec. 60 of the Consolidated Municipal Loan Fund Act, ch. 83 of Consolidated Statutes of Canada, provides "That all sums of money coming to the municipality as the profits, dividends, or returns, from any work for which the loan has been authorized, or as interest or principal of any sum lent by the municipality out of said loan, or otherwise howsoever by reason of such loan, shall be paid into the hands of the Treasurer, and

(a) 1 Jur. N. S. 1145.

(b) 29 Beav. 144.

by him be carefully kept apart from all other moneys and paid over from time to time to the Receiver General, to be by him placed to the credit of the municipality with the Consolidated Municipal Loan Fund, except in so far as it is otherwise specially provided in the by-law authorizing such loan." Now by-law No. 66, in accordance with this section of the statute, expressly devotes the proceeds or payments of or on these harbor debentures to the credit of the municipality with the Consolidated Loan Fund. The Town Council, therefore, have acted not merely in violation of their by-law, but of the statute; and therefore it is that it is objected here that the Attorney General should have been made a party, and it is said that the Attorney General might himself have filed a bill to have the breach of trust repaired. I think I must look at the present suit as in the same position and character as if the bill had been filed by the Town Council or Corporation seeking to get back funds, of which they were the proper custodians, if not the owners. The bill is not filed to appropriate the funds to any person or for any purpose other than as was originally provided. It is not for distribution or payment of the funds: it is for restitution; and to this the interests of the Crown can be in no way adverse. The object of the suit is to have the funds replaced in the hands which by law should always have held them; and I think it would be too much to say, that if the funds had got astray by accident, for instance, or by the fraud of the officer of the corporation, into the wrongful possession of a third party, that the corporation could not file a bill to recover them without making the Attorney General a party, even though they were ultimately to go to the Crown. The tendency of all modern practice is to dispense with parties to the record where it can be done with safety; and as the only interest that the Attorney General can have, in being a party to the suit, is that he may see that the account as against the Bank is correctly taken and

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the proper amount in debentures or money paid in, he can for that purpose be made a party in the Master's office, or by the Court at the hearing of the cause, if it should be deemed expedient so to order.\*

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ARMSTRONG V. THE CHURCH SOCIETY OF THE DIOCESE OF TORONTO.

*Parties—Suit by one on behalf of himself and others.*

A suit will lie by an individual corporator complaining of an illegal diversion of the funds which the corporation holds as trustee, though the plaintiff may himself have no pecuniary interest in the funds so alleged to have been diverted: but he must sue on behalf of himself and all other corporators.

Statement.

This was a bill by *William Armstrong* and *William Henry Boulton*, corporate members of the Church Society of the Diocese of Toronto; the defendants being the Church Society and the *Attorney General*. The bill alleged, amongst other things, that the Society since its incorporation had become possessed of large sums of money contributed by various charitable persons and bodies, and obtained by periodical collections made from time to time from members of the United Church of England and Ireland in Canada and elsewhere, and otherwise; such contributions and collections having been made with the object and for the purpose of being administered and applied by the Corporation for the promotion of the objects set forth in the Act of Incorporation (a), and in the constitution of the Society; that, by an arrangement with all parties interested, the Society received

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\* This judgment was subsequently affirmed on re-hearing, before the Chancellor, and Esten and Spragge, V.CC. On the re-hearing the above judgment was mislaid, and it has only recently been found.

the Clergy Reserve commutation money, and were trustees for its due administration, under a by-law which provided, amongst other things, for keeping the fund distinct from the other funds of the Society. The bill further alleged that various breaches of duty in respect of all these funds had taken place; that, by means of various irregular and improper proceedings which the bill set forth, large sums of money had been wholly lost; that, unless active steps were taken, further losses would be sustained, to the great injury and impoverishment of the clergy of the said Church, and of other persons interested therein; that the plaintiffs were, and had been for several years, corporate members of the Society; and that they had resisted and endeavoured to prevent and correct the breaches of trust complained of in the bill, but hitherto without effect. The bill prayed that an account might be taken of the trust funds and property received by the Society as in the bill mentioned, and of the present state and condition thereof, and of the dealings of the Society therewith; that such further and other relief might be granted from time to time, either by the appointment of a receiver or the award of a writ of injunction or otherwise, as the nature and exigencies of the case might require; that the costs of the suit might be paid; and that for the purposes aforesaid all proper directions might be given and accounts taken.

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Statement.

To this bill the Corporation filed a general demurrer for want of equity. The most important point argued in support of the demurrer was, that the plaintiffs had no right to sue; that, if the facts were as they alleged them to be, the suit should be by the Attorney General, or by some of the clergymen pecuniarily interested in the due administration of the trust funds.

Mr. *Crooks*, Q. C., in support of the demurrer.

Mr. *Strong*, Q. C., and Mr. *McLennan*, contra.

1867. *Brogdin v. The Bank of Upper Canada* (a), *Evan v. The Corporation of Avon* (b), *The Skinners' Company v. The Irish Society* (c), *The Attorney General v. Daugers* (d), *The Attorney General v. St. John's Hospital* (e), *The Presbytery of Bermondsey v. Brown* (f) *The Stockport District Water Works Company v. The Mayor &c., of Manchester* (g), *The Attorney General v. Leicester* (h), *Bromley v. Smith* (i), *Dummer v Chippenham* (j), *Paterson v. Bowes* (k), *Winch v. The Birkenhead &c. Railway Company* (l), *Hare v. The London &c. Railway Company* (m), *Cumberland v. Wayne* (n), *Seton on Trustees* 608-767, *Lindley on Partnership* 75, were referred to.

Judgment.

MOWAT, V. C.—It was held fourteen years ago in *Paterson v. Bowes* (o), that a suit would lie by any of the members of a municipal corporation to remedy an illegal application of the funds of the corporation. The judgment was by the two Vice-Chancellors, and I recollect that Chancellor *Blake*, who was absent from illness when the argument took place, was present when judgment was given, and intimated his concurrence therein. The judgment was acquiesced in by the defendants; and there have since been several cases of like bills, in which the decision in *Paterson v. Bowes* was either unquestioned at the bar, or if questioned was upheld by the Court. Its propriety was disputed before the present Chancellor in *Brogdin v. The Bank of Upper Canada* on the authority of a subsequent case

(a) Ante, page 544.

(c) 12 Cl. & F. 425.

(e) 1 Law Rep. Ch. App. 92, 106; 12 Jur. N. S. 127.

(f) 1 Law Rep. Eq. 204; 13 Law T. N. S. 574.

(g) 9 Jur. N. S. 266.

(i) 1 Sim. 8.

(k) 4 Gr. 170.

(m) 7 Jur. N. S. 1153.

(o) 4 Gr. 170.

(b) 29 Beav. 144.

(d) 33 Beav. 631.

(h) 9 Beav. 546.

(j) 15 Ves. 245.

(l) 5 DeG. & S. 562.

(n) 1 W. & T. 295-297.

of *Evan v. Corporation of Avon* before the Master of the Rolls (a), but was maintained by the Chancellor; and his decree was affirmed by all the Judges on a re-hearing. The suit was by a ratepayer, on behalf of himself and all other ratepayers, of the municipality of Port Hope; and, independently of the cases in Canada, seems fully supported by the English case of *Bromley v. Smith* (b), which was relied on by the Court in *Pater-son v. Bowes*, but was not cited to the Master of the Rolls in *Evan v. Corporation of Avon*,—and by the opinion of Lord Westbury, in the late case of the *Stockport District Water Works Company v. The Mayor, &c., of Manchester* (c). That was a suit by a water company to set aside, on the ground of illegality, a contract which the Municipal Corporation of Manchester had entered into with a rival company for the supply of Stockport with water. The bill was demurred to, and the Lord Chancellor allowed the demurrer. His judgment contained the following observations: “If I had here a party who had a right to restrain the Manchester Corporation within its proper limits, *as, for example, the ratepayers*, who were interested in having the water at the lowest amount, and in having the certainty of an abundant supply; or if \* \* I had the Attorney General here as an informant \* \* I should probably not hesitate to restrain the Corporation of Manchester from carrying into effect the agreement which they have entered into with the registered company. But here I have a rival company, and, whatever may be the general merits of the controversy, the question is, whether they can be represented by that company. \* \* There is no difficulty in defining the course of action for the purpose of restraining the conduct complained of so far as that conduct is an injury to the public, or so far as the conduct affects individuals to whom the Manchester Corporation is properly responsible,” &c.

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(a) 29 Beav. 144.

(b) 1 Sim. 8.

(c) 9 Jur. N. S. 266.

1867. I think that experience has shewn that the rule, which thus permits an individual corporator to maintain such a suit, is a useful one, and a rule which I should feel no reluctance in maintaining. It is also in accordance with the express policy of the Legislature as shown in the facility which is afforded to any party interested to take proceedings for quashing illegal by-laws of municipal corporations, without the sanction of the Attorney General or the concurrence of any other public officer.

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Judgment.

Most of the arguments of the learned counsel for the defendants went, either expressly or in effect, to attack the doctrine maintained in the cases cited. Thus it was said, that the Attorney General was the proper party to sue, because the members of this society are fluctuating; but I presume there is at least as great fluctuation amongst the inhabitants of a municipality as amongst the members of the Church Society. Again, it was said, that the plaintiffs could not sue because they had the alternative of withdrawing, if they chose, from the society, if they were dissatisfied with its proceedings. But so also, I suppose, may ratepayers and inhabitants remove themselves and their property from the locality, the wrongful proceedings of whose municipal council they complain of (*a*).

The smallness of the annual sum necessary to qualify a member was remarked upon; but it is well settled that this circumstance is not material. Every member of a corporation has a right to object to any illegal diversion of its funds; and in this respect those who contribute most have no greater rights than those who contribute least (*b*). It does not appear from the bill to what extent the plaintiffs have contributed to the funds of the society.

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(*a*) See also *Foley v. Wontner*, 2 J. & W. 245; *Davis v. Jenkins*, 3 V. & B. 151.

(*b*) *Charlton v. The Newcastle and Carlisle Railway Company*, 5 Jur. N. S. 1096

Passing by the other arguments which, like these, are in effect answered by the authorities already referred to, I have now to allude to those which do not belong to this class.

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It was said, on behalf of the defendants, that the plaintiffs have no pecuniary interest in the relief they pray, as the bill shews that they were aware beforehand of the proceedings to which the bill objects; and the bill states they always opposed them; that they are therefore not personally liable for the alleged breaches of trust; and that without a personal pecuniary interest they cannot sue. But, unless the *cestuis que trust* interfere, their trustees can always sue for a matter for which the *cestuis que trust* might sue if they chose (a). It is not to be doubted that, if any of the plaintiffs in *Paterson v. Bowes* and the other suits of that class had been shewn to be ratepayers in respect only of property of which they were trustees for others, this could not, on any principle recognised here, have been held a disqualification. But there are many cases in which this Court gives relief on grounds of an interest that is not pecuniary (b); and when I look at the objects of the Church Society, as defined by the Legislature (c), or as set forth in this bill, I cannot say that its members have not a very important and substantial interest in its well doing, even though such interest may not be, in any sense, so far as they themselves are concerned, of a pecuniary kind.

Judgment.

It was further contended, on the part of the defendants, that the bill should have been against individual members

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(a) And see *Milligan v. Mitchell*, 1 M. & K. 446.

(b) Vide *Morland v. Richardson*, 2 Jur. N. S. 726, 3 Ib. 1188; *Prince Albert v. Strange*, 1 McN. & G. 25; *Perry v. Shipway*, 1 Giff. 1; *Foley v. Wontner*, 2 J. & W. 245; *Davis v. Jenkins*, 3 V. & B. 151; *Milligan v. Mitchell*, 3 M. & C. 72.

(c) 7 Vict. sec. 68.

1867. charged with being parties to the wrong, instead of being against the corporation alone; but the contrary of this contention was decided in *Winch v. The Birkenhead, Lancashire, and Cheshire Junction Railway Company* (a).

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Society.

Another objection to the bill was, that the suit should have been by the plaintiffs, not for themselves only, but as suing on behalf of all other members of the corporation. This objection appears fatal to the bill in its present form; but not being specifically mentioned in the demurrer, can only be allowed without costs (b), the plaintiffs having the usual liberty to amend.

Though in favour of the defendants on this point, I have thought it right to observe on the other points argued, so that, in case of the bill being amended, it may not be necessary to renew before me, on another demurrer, the objections already discussed and considered.

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#### ARMSTRONG V. CAYLEY.

*Practice*—Appeal from Chambers order—Within and for what time to set down.

An appeal from an order made in Chambers was set down to be heard for a day falling within the time appointed for examination and hearing term.—This was held irregular; and on that ground the case was struck out of the paper with costs.

*Statement.* This was an appeal from an order made in Chambers by V.C. *Mowat*. The appeal was set down for Wednesday the 24th of April, 1867. The spring term and circuits commenced on March the 18th, and ended about

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(a) 5 DeG. & S. 562.

(b) *Cooper v. Earl Powis*, 3 DeG. & S. 688; *Milligan v. Mitchell*, 1 M. & C. 433-4; *The Duke of Devonshire v. Eglin*, 14 Beav. 530.

the 10th of June. The appeal came on before the Court on the 30th of June, when

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Mr. *Burns*, for the plaintiff, contended that under section 2 of General Order 87 (page 215 of Taylor's Orders), the appeal was irregularly set down, being for a day during examination term.—*In re D. G. Miller (a)* was referred to as shewing the irregularity of the proceeding.

Mr. *A. Hoskin*, for the plaintiffs, contended that the meaning of the order was that the case could be set down for any day during the term, and would stand over until the first day the Court sat after term; but

VANKOUGHNET, C.—What I said in the case of *Jury v. Burrowes (Re D. G. Miller)*, has been misapprehended by the Reporter. The facts of that case, as far as they go, are correctly stated; but the point actually decided is not given, which was, that the case having been set down for the last Wednesday of the month, at which time the examination terms were proceeding, when, by the Orders, the Court does not sit for these appeals, it was, therefore, not set down regularly. It might as well have been set down for any other day; which is is precisely the point here.

Judgment.

We therefore refuse to hear the case, and order it to be struck out of the paper of causes, with costs.

SPRAGGE and MOWAT, V.CC., concurring.

*Cause struck out with costs.*

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## MOORE V. THE GRAND RIVER NAVIGATION COMPANY.

*Corporation—Discretionary powers—Jurisdiction.*

A Company incorporated for the purpose of improving the navigation of the Grand River, is bound to exercise its powers reasonably, so as to avoid doing any unnecessary injury to neighbouring proprietors.

The Court will reluctantly interfere with the Company's discretion where amongst engineers there may be a difference of opinion; but as it appeared in this case that the damage complained of by the plaintiff might be avoided by certain alterations of the Company's works, suggested by an eminent engineer to whom the matter was referred by the Court, and it being stated on behalf of the Company, that these alterations would have been made by the Company if suggested before suit; the Court decreed the making thereof agreeably to the engineer's report.

Hearing before the Chancellor. The facts are fully stated in the judgment.

Mr. *Blake*, Q. C., and Mr. *VanNorman*, for the plaintiff.

Mr. *E. B. Wood*, for the defendants.

**Judgment.** VANKOUGHNET, C.—This case was partially heard before my late brother *Esten*, who also took the examination of the witnesses. As I understand, he decided against the plaintiff's claim except as to two of the matters mentioned, which he made the subject of reference to Mr. *Walter Shanly*, an engineer of well established eminence, by the following order: "That it be referred to *Walter Shanly*, Esquire, civil engineer, to inquire and state whether or not the defendants, The Grand River Navigation Company, ought to restore in effect the second weir mentioned in the depositions in this cause, as reduced; with power to the said defendants, The Grand River Navigation Company, in freshets, of removing the obstruction so as to admit the passage of ice, water, and drift wood. Also, whether or not the

said defendants, The Grand River Navigation Company, 1867.  
ought to alter the set of the dam, or weir in the depositions mentioned, so as to direct the water down the middle of the ravine, in the pleadings mentioned, in a straight course. And this Court doth reserve the further consideration of this matter, and the question of costs, until after the said *Walter Shanly* shall have made his report.”

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Company.

Mr. *Shanly* has made his report, and the case has been argued before me on the matters embraced in it.

The defendants, The Grand River Navigation Company, whose rights the town of Brantford claim now to exercise, have under their Act of Incorporation very large powers. These have been under the consideration of the Courts of Law in the following cases: *Kerby v. The Grand River Navigation Company* (a), *Young v. The Grand River Navigation Company* (b), *Phelps v. The Grand River Navigation Company* (c).

Judgment.

The damage of which the plaintiff complains here, viz.: the overflowing and washing away of his land in consequence of the works erected by the Company, or the town acting in their name, does not seem to have been clearly, if at all, provided for by the Act. In the then existing state of things it may have been thought, that any such action of the water, as is alleged here to have been caused by the defendants recently, would cause no damage or injury to any one; or only damage of such a character as not to merit compensation. But however this may be, and however wide and great the powers of the Company are, the exercise of those powers is, in this Court at all events, always subject to that controlling maxim and principle of law which is expressed in

(a) 11 U. C. Q. B. 334.

(b) 12 U. C. Q. B. 75.

(c) 12 U. C. Q. B. 245.

1867. the words "*Sic utere tuo ut alienum non lædas.*" If the defendants, in the execution of these works, can reasonably so construct them as to answer their purpose and do no damage, or less damage, than another method would occasion, then I think they are bound so to construct them, and to avert, or lessen, the damage which another plan would occasion. The plaintiff's complaint here is that the Company have constructed works, by means of which a portion of land of the plaintiff's, known as "the flats," has been overflowed. The first inquiry that naturally and immediately presents itself to one's mind is, what was the condition of these flats before the defendants' works were erected at all? It is not pretended, that the flats are overflowed except in times of freshets or high water, which usually occur in the spring.

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Navigation  
Company.

Judgment.

It is clear, it seems to me, that at such times these flats were overflowed before the natural course of the stream was interfered with. The river is very sinuous, and of varying proportions. At high water it spreads itself over the flats, the high bank and narrow channel above being thus relieved from the swollen torrent. Have the defendants' works caused any increase in such floods on this land? I do not find from the evidence that they have; and, if they had, would it have made any difference to the plaintiff, that, during the period of high water, the land was submerged now by four feet of water in depth, whereas formerly it had only a depth of two feet? If such a difference be injurious to the plaintiff, he has not proved it. To prevent the water flooding the flats, the plaintiff erected a high embankment hoping thereby to enclose the water, at all times, within its natural channel; he thus interfering with the original state of things under which the water had been permitted to spread over the flats. His embankment failed of its purpose; was swept away by the angry stream, which, bursting its artificial enclosure, spread over the plaintiff's land, and caused him the actual damage

which he has suffered. Now, I do not see that the defendants' works in any way promoted this. Had the plaintiff's embankment not been where it was, the waters would have passed over the flats as of old—the river been relieved, and the violent and sudden action of the water upon the land, where the embankment gave way, have been prevented. If the action of the water upon the flats, by means of the defendants' dam and weir, is more injurious than it was formerly, I do not find it proved, except as to the effect caused by the mode in which the weir is set; of which I will speak presently. It does not seem to me that in the erection of the dam or weir, the defendants have abused their powers, or indulged in any unreasonable exercise of them, subject to the exception above alluded to. The defendants' object or purpose in erecting this dam and weir, was a legitimate and obvious one. A portion of the waters of the stream escaped from the main channel of the river, down a ravine along the western side of the plaintiff's flats. The defendants erected this dam to prevent this escape, and retain the waters in the main channel of the river for the proper uses of the Company and the public. I think therefore that the plaintiff's main case fails.

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Company.

Judgment.

As regards the second subject of reference to Mr. *Shanly*, I think the defendants should either alter the set of the weir, or adopt the suggestion of Mr. *Shanly*, to protect the west side or bank of the plaintiff's flats from the increased action of the water caused by the weir. This is a minor or secondary cause of action which probably never would have, by itself, formed the subject of litigation. Still, as the defendants can without unreasonable expense make the alteration or protection suggested by Mr. *Shanly*, and as their counsel, in argument before me, said they would always have done this if the plaintiff had required it, I see no objection or difficulty to order it to be done, and for this purpose, but for this only, I retain the bill. The defendants, we

1867. must take it, were incorporated for a public purpose.

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They were given deliberately the powers which they possess. The exercise of them was and is necessarily very much in their discretion. It is difficult to control it. Works, such as they must necessarily erect for turning to useful account the river, may or must cause more or less damage. As to the skill and judgment employed in their erection, a variety of opinions prevail. One engineer will advise a certain plan; another engineer will condemn it. In this very case Mr. *T. C. Keefer*, a professional man of skill and reputation, condemns the report made by Mr. *Shanly*, under the reference of this Court. What is a company, formed as the defendants' is, to do in such a case? Are they to change their works with every change or difference of opinion among engineers, or persons competent, or supposed to be competent to pass judgment upon them. The Legislature could never have intended to subject them to such perils. Thinking however that some of the damage which the

Judgment. plaintiff complains of might be avoided by some alteration in the present set of the weir, or by providing against its operation, as suggested by Mr. *Shanly*, I order that the defendants alter the set or position of the weir in accordance with his suggestion; else adopt the means pointed out by him to prevent the damage which its present position causes to the plaintiff: and that if the plaintiff prevents, or within one month declines, or does not file a written consent to permit the Company to act upon this latter alternative, the bill be dismissed with costs; and if the plaintiff consents that the Company adopt either one or the other of the alternatives, with liberty in the latter case, or on failure of the Company to do so, for either party to apply; that the plaintiff pay to the defendants, the Company and the town, the costs of the suit up to this time, including the fees paid to the arbitrator, Mr. *Shanly*, less one-fourth part thereof; and that the bill, as against the defendant *Broughton*, be dismissed with costs.

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## MCAULEY V. ROBERTS.

*Injunction—Nuisance.*

The defendant had built a drain from his premises to a lot of which the plaintiff became lessee. Being desirous of building on this lot, he requested the defendant to stop up or remove the drain, which the defendant at first refused, and afterwards neglected to do. It was alleged by the defendant that the cost of diverting the drain would have been \$14 only:

*Held*, that the plaintiff was not obliged to take the law into his own hands, and divert the drain, and sue the defendant for the expense; and it appearing that the plaintiff's building could not be safely proceeded with until the drain was stopped up or diverted, an injunction was granted, requiring the same to be done.

Statement.

This was a motion for an injunction to restrain the defendant, his tenants, servants, workmen, and agents, from discharging into the premises of the plaintiffs, the sewage or waste water from the house or premises of the defendant situated on lot four hundred and fifty-five in the Town of Stratford, in the County of Perth, through a certain drain constructed under the said house of the defendant, and terminating in the plaintiff's premises; being a portion of lot two hundred and fifty-five in the said Town of Stratford—or that the defendant might be ordered to close up the said drain, or divert it from the premises of the plaintiff.

Mr. *Donovan*, for the plaintiff.

Mr. *Rae*, contra.

Judgment.

MOWAT, V. C.—The plaintiff has a building lease of a lot of land in the Town of Stratford, lying between George Street and the river. The defendant owns a house and lot on the opposite side of George Street, and has built a drain under the house. This drain, being carried across George Street to within a foot

1867. of the plaintiff's lot, discharges upon the lot the water and sewage from the defendant's house and premises. The plaintiff's lot being unoccupied, the plaintiff or the owner did not, for a time, interfere with the defendant's drain; but in November, 1866, the plaintiff, being about to commence the erection of an hotel on his lot, notified the defendant of this intention, and desired him to remove or close up the drain, which the defendant then promised to do. The plaintiff contracted for the erection on his lot of a brick and stone building, to be completed on or before the 1st of December, 1867. In April, 1867, the work was begun; and the drain not being removed, the plaintiff applied again to the defendant on the subject, pointing out to him, on the ground, the injury and obstruction the drain was causing; but the defendant in very violent language refused to remove it. So the plaintiff swears, and the statement is not denied by  
Judgment. the defendant. But the defendant appears afterwards to have been disposed to divert the drain from the plaintiff's lot, though, as the defendant states, he did not then and does not now acknowledge any right in the plaintiff to call on him to do so; and as he did not commence the work, the plaintiff filed the present bill.

It is quite clear that the defendant has no right to continue the drain to the plaintiff's injury, and that the nature of the injury sustained is such as to entitle the plaintiff *primâ facie* to an injunction.

The defendant, however, says that the drain may be diverted at a cost of \$14; that the plaintiff should himself have removed it, and sued the defendant for the cost; and that he can have no remedy by injunction.

No authority that was cited supports this view. If the damage to the plaintiff from the drain if continued would be but \$14, this Court certainly would not interfere by

injunction (*a*). But does the same rule apply where the damage from the drain is large and not easily estimated, though the cost of removing the drain, if the removal was concurred in by all parties, would be small? Is the cost of abating a nuisance, rather than the injury which the nuisance is inflicting, the material consideration? Where the cost of abating the nuisance would be small, has the injured party no remedy against damage but to take the law into his own hands, and incur whatever hazard there may be in that course; the work to be done for the purpose not being on the land of either party but on public property? I am not prepared, in the absence of authority, so to hold; and the conduct of the defendant appearing to have been perverse, and the plaintiff's right being clear in other respects, I do not feel at liberty to refuse an injunction.

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v.  
Roberts.

The other circumstances relied on in the affidavits as an answer to the motion, seem to me entirely insufficient for the purpose, and I do not further remark upon them. Judgment.

It may be a question whether the plaintiff might not have applied on the equity side of the County Court (*b*), and whether, if the suit proceeds to a hearing, the plaintiff will be entitled to any costs, even if the decree should be in his favour (*c*). But I take for granted that the Court will not be called upon by either party to decide these questions.

The injunction will be as in the first branch of the notice of motion, omitting the mandatory part as unnecessary.

(*a*) Dent v. Auction Mart Co. 2 Law. Rep. Eq. 246, &c.

(*b*) Consol. U. C. 220, ch. 15, sec. 34, sub-sec. 8.

(*c*) 6 Ib. sec. 63.

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## RE ROBERT HOLT AND JOHN GRAY.

*Insolvent Act—Discharge of Insolvent—Fraud.*

Where a person in business finds himself unable to pay twenty shillings in the pound, it may or may not be his duty to discontinue his trade, according to circumstances: continuing his business may be a fraud, but is not necessarily so.

A trader, after discovering that his affairs were not in a position to pay twenty shillings in the pound, continued his business, in the hope, which was not shewn to have been absurd or unreasonable, that he would thereby be able to pay all his debts in full and meet all his engagements; and in the course of the business so continued contracted some new debts; but was unsuccessful, and after a time found it necessary to make an assignment under the Insolvent Act: *Held*, that he was not thereby disentitled to his discharge.

On an application for an order of discharge, the insolvent is entitled to read his own examination, though taken at the instance of a friendly creditor; and the only question is as to the weight to be attached to it.

This was an appeal by *John Gray*, an insolvent, against an order of the County Court Judge of the County of Wentworth, bearing date the 30th of April, 1867, refusing the insolvent his discharge.

Mr. *Scott*, for the appellant.

Mr. *Gwynne*, Q.C., contra.

Judgment.

MOWAT, V. C.—The application to the County Judge was under the 10th clause of the 9th section of the Insolvent Act of 1864, which provides for an application to the Judge after the expiration of one year from the date of an assignment under the Act, where an insolvent has not obtained the consent of the required proportion of his creditors. The Act does not lay down any rules for the guidance of the Judge in exercising the jurisdiction which is given to him “for granting the discharge of the insolvent absolutely, conditionally, or suspensively, or refusing it absolutely” (a);

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(a) Sub-sec. 12.

but provides for an appeal from whatever order he may make. Where the application is to confirm a discharge to which the required proportion of the creditors have consented, a previous clause (a) specifies the grounds on which any creditor may resist that application ; and in such a case it can, I presume, be resisted on no other grounds. Where the creditors have given no consent, the Judge does not appear to be confined to these grounds ; and, on the other hand, some of them may be regarded by him as possessing less weight, after an insolvent has been punished by a year's delay in getting his discharge, than they would have been entitled to on the earlier application which the creditors' consent would have put it in the insolvent's power to make.

1867.  
Re Holt et al.

The ground of refusing the appellant's discharge is stated in his petition of appeal and his affidavit to have been, that he and his partner had been guilty of fraud in incurring a debt to *George M. Pirie*, one of the three opposing creditors ; that, in incurring this debt, *Gray* is chargeable with having "purchased goods on credit, or procured advances in money, knowing or believing himself to be unable to meet his engagements, and concealing the fact from the person thereby becoming his creditor, with the intent to defraud such person" (b). The firm in October, 1865, gave their note to *Pirie*, and he has proved a debt of \$212.78. The papers delivered to me contain no evidence that this debt was for goods purchased or money advanced, though I presume the fact was so, as this appeared to be assumed by counsel on both sides. The date of the purchase or advance is also wanting ; nor does it appear whether the note was given for a single purchase or advance, or whether the amount, or part of the amount, was due in respect of several transactions, though it does appear there had been several transactions between the

Judgment.

(a) Sub-sec. 6.

(b) Insolvent Act, 1864, sec. 8, sub-sec. 7.

1867. parties, covering, apparently, a considerable period.  
Re Holt et al. The learned counsel for the respondents referred in his argument to what appears as to some other debts contracted about the same time; but if the case as to *Pirie's* debt fails, I do not think a stronger case can be made out against the appellant by means of these other debts. I have said that *Pirie's* debt, as proved, is \$212.78. The other two opposing creditors have proved respectively debts of \$554.96 and \$253.26. The assignee, the representative of the general body of creditors, did not oppose the insolvent's application to the County Court Judge or here; and the whole amount of debts proved, up to the 24th of April, 1867, was \$26,764.83; so that the opposing creditors constitute less than one-twenty-sixth, in amount, of the creditors who have proved.

Judgment. The only evidence of the supposed fraud is the examination of the insolvents. They were examined a second time at the instance of the appellant's brother, who is also a creditor; and the respondents insist that these examinations should be excluded, as having been had in the interest of the insolvent. The objection is said not to have been taken in the Court below; but, whether it was or not, I think the second examinations admissible. The only question is as to the weight which should be attached to them.

The insolvents carried on business as brewers at Dundas, in and previously to the year 1857. In that year they made an assignment for the benefit of their creditors. The trustees sold the establishment to one *John Lesslie*, by whom the business was thenceforward carried on, with apparent profit, for four years, through the insolvents as his agents. The insolvents then bought the property and business from *Lesslie*, and assumed the liabilities of the business as they then stood; and thenceforward carried it on in their own names. In November, 1863, the brewery and its contents were

destroyed by fire. The partners then had an investigation made of their affairs, and found that, taking their assets at what the particulars of which they consisted had cost, they would nearly pay twenty shillings in the pound. The position of the firm was, notwithstanding, such that the partners would have gone into bankruptcy, if there had then been a bankrupt law, which there was not; but if they had then wound up their business, their creditors would probably not have got twenty-five cents in the dollar, in consequence of the sacrifices which the sudden winding up of the business would have occasioned. Under these circumstances, and having obtained a promise of assistance from two friends, whose advice they took, and to both of whom I infer from the evidence that they disclosed the true condition of their affairs, they determined to rebuild the brewery, and to resume business, hoping, by means of their experience and energy, to be able to retrieve themselves. They accordingly rebuilt the brewery, and continued their business; but the business proved a losing one, and, after a hard struggle of two years and upwards, they were obliged to succumb. On the 26th of January, 1866, they made an assignment under the Act. At that date *Holt* says that the books are correct in stating their assets at \$29,656.02, and their liabilities at \$32,175.27. In October, he says, their assets were \$2000 more than in the following January. I have no information on these points beyond what *Holt's* examination gives.

1867.  
Re *Holt et al.*

Judgment.

*Pirie's* note, as I have said, was given in October, 1865; and *Holt* says, in his first examination: "Did not contemplate an assignment in October, 1865. \* \* Did not think we would have to make an assignment, until the bank closed down on us. \* \* As a rule we paid for everything required for the brewery in money received from the bank on indorsed notes; and have been conducting the business in this way for three or four years." *Gray*, in his first examination, concurred generally in what had been said by *Holt*.

1867. In *Holt's* second examination he made the following statement, which, like all his statements, is uncontradicted by any other evidence: "We did business with Mr. *Pirie* for years in the ordinary course of business, and he was well aware that we were struggling with difficulties, the whole of the time we were in business after our first failure. On the 14th of November, 1865, we paid a note to Mr. *Pirie*, and we paid money to him afterwards. He was anxious to do business with us. People were glad to do business with us; and we paid everybody as far as we could, until the bank shut down upon us. I did not explain our position to Mr. *Pirie*. We expected to have been able to pay all our liabilities, and I think would have done so if the banks had not shut down upon us."

Re *Holt et al.*

Judgment. *Gray*, in his second examination, speaking of the note given to *Pirie* in October, 1865, says: "I expected that it would be paid, as I thought we had a fair prospect of working through our difficulties. I thought we would work through. \* \* We expected to meet all our engagements when that note was given."

I think it extremely probable the firm were never in such a position, that, if suddenly called upon to pay their liabilities, they could have done so; or that, if their business was stopped, their assets would have realized sufficient to pay in full; and, in this sense, the firm were always insolvent, or unable to meet their engagements. I think *Gray* meant no more than this by certain expressions in his examination which were relied on in argument. The firm did meet their engagements for several years, notwithstanding that the position of their affairs was what I have described. Further, I have no doubt that, at the time of giving the note to *Pirie*, the firm had not assets enough to pay all their liabilities, even taking the assets at a fair valuation, and not merely at what they would produce on a forced realization; and that the

partners were themselves aware of this ; but there is nothing in the papers before me inconsistent with the supposition that both partners expected to be able, notwithstanding, to carry on their business as they had done theretofore, and hoped ultimately to pay all their creditors in full ; nor is there anything before me to shew that this hope was one which reasonable men, of business capacity and experience, might not well have entertained.

1867.

Re Holt et al.

Now, the mere fact of a man's having expected, or saying he expected, when he contracted a debt, to be able to pay it, does not necessarily justify his having contracted the debt ; for the expectation may have been unreasonable and improbable : we have to look at the grounds, or alleged grounds, of the asserted expectation. The law holds a man to have intended the reasonable and probable consequences of his own acts ; and, if he defends himself in respect of an injurious act by asserting that it was done under a belief that made it innocent, the same principle applies as when he makes an untrue statement—a defence which was thus observed upon by the Lord Chancellor, in a late case in the House of Lords (a) : “ Supposing a person makes an untrue statement, which he asserts to be the result of a *bona fide* belief in its truth, how can the *bona fides* be tested except by considering the grounds of such belief ? And if an untrue statement is made, founded upon a belief which is destitute of all reasonable grounds, or which the least inquiry would immediately correct, I do not see that it is not fairly and correctly characterised as misrepresentation and deceit.”

Judgment.

Does the mere fact, then, of a man's continuing his business, and receiving some further advances from individual creditors, after his assets have become less than his

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(a) *Western Bank of Scotland v. Addie*, Law Reports 1 Scotch App. 162.

1867. liabilities, necessarily make his ability to pay any debt he contracts in the course of it so unreasonable and improbable that an intent to defraud must be inferred? That has never yet been held, so far as I am aware; and I am satisfied was not the meaning of the enactment in question. The continuance of a business may or may not be a fraud, according to circumstances. A trader's liabilities may certainly be so large, and his assets so small, and his business so situated otherwise, that to continue it would be a fraud. But, in the present case, the insolvents were able to continue their business for upwards of two years after the fire, and, so far as appears, were able to meet their engagements during all this time; the debt in question was of small amount, and appears to have been contracted in the ordinary course of their business; and there is not enough in the papers to enable a Court to say that, at the time of contracting the debt, they had no reason for expecting that they would be able to pay it, as they had paid their debts all along. The language employed by Lord Justice (then V. C.) *Knight Bruce*, in *Ex parte Johnson* (a), seems entirely applicable to the case: "The first question is, whether Mr. *Johnson* improperly continued his trade when his circumstances were insolvent, and he had no reasonable hope of recovering himself, or of trading for any useful purpose. It cannot be contended that a man must leave off trade because he is in difficulties. They may be surmounted. Nor can I, upon the materials before me, pronounce that, at any moment of time before this bankrupt placed himself in the hands of his creditors, he conducted himself recklessly. I cannot assert, that at any moment before that time it was his duty to stop his trade, wind up his affairs, and give up his property. That he had always conducted himself prudently, and taken sound and correct views of the state of his circumstances, I do not say. But there is a wide difference

Re Holt et al.

Judgment.

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(a) 1 DeG. & S. 27.

between such conduct and bad intention. Conduct may 1867.  
 so grossly infringe the ordinary rules of discretion as to  
 amount to evidence of fraud. There appears to be  
 nothing here which goes to that extent; nothing so  
 grossly imprudent as to afford of itself evidence of  
 unfairness. I do not see any proof of dishonest inten-  
 tion in the case.” Re Holt et al.

On the whole, I think that the papers before me disclose no sufficient ground for refusing the appellant his certificate; and that the order of the Judge should, therefore, be reversed; and the certificate granted.

### CUNNINGHAM V. LYSTER.

*Principal and surety—Accommodation indorsement—Costs.*

Accommodation indorsers, after the note on which they were liable had matured, filed a bill against the holder and maker to enforce payment by the latter; the relief prayed was granted, and the maker was ordered to pay the costs both of the plaintiff and of the holder of the note.

The plaintiffs had indorsed a note for the accommoda-  
 tion of the defendant *Lyster*, who was the maker, and  
 the note was held by the defendant *Simpson*. The bill  
 alleged that the note was some months overdue, and  
 that the defendant *Simpson* had refused and neglected  
 to enforce payment from the maker, and prayed that  
*Lyster* might be ordered to pay the amount into Court. Statement.

The cause came on to be heard by way of motion for decree before the Chancellor.

Mr. *R. Walkem*, for the plaintiffs, contended that it was an ordinary and proper case for the relief of sureties in equity.

1867. *Mr. Edgar*, for the defendant *Simpson*, conceded the right of the plaintiff to relief, but insisted that the defendant *Simpson* was entitled to be paid his costs of suit by the co-defendant *Lyster*, whose default had occasioned the litigation.

Cunningham  
v.  
Lyster.

*Mr. Moss* for defendant *Lyster*. The bill should have shewn a request by the plaintiffs to the holder of the note to proceed, and he contended that the defendant *Simpson* should pay the plaintiffs' costs if costs were allowed at all: but

VANKOUGHNET, C., held that the allegation in the bill that the holder "neglected and refused" to proceed was sufficient, and directed the money to be paid into Court by the defendant *Lyster*, and the costs of all parties to be paid by the same defendant.

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### CRAWFORD V. ARMOUR.

#### *Mortgages.*

A mortgagor conveyed part of the mortgaged property to a purchaser, the mortgagor covenanting against incumbrances; and the mortgagee subsequently released the part so sold from his mortgage:

*Held*, that, as this release was in accordance with the mortgagor's own obligation as to that part, it did not affect the mortgagee's right to recover the mortgage debt, or his lien on the rest of the mortgaged property.

*Statement.* This was a foreclosure suit, and came on to be heard on bill and answer, before Vice Chancellor *Mowat*.

The plaintiff was holder of a mortgage on 400 acres of land. After giving this mortgage, the mortgagor (23rd April, 1863) sold and conveyed 100 acres of the mortgaged property to *Alexander Crawford*, with covenants

for title, free from incumbrances. On the 28th November, 1863, a *fi. fa.* against the mortgagor's lands was placed in the Sheriff's hands; and, under it, the mortgagor's interest in the 400 acres was sold to the defendant *Armour*. Pending the proceedings on this writ, the mortgagee released to *Alexander Crawford* all claim on the 100 acres under the mortgage. *Armour* subsequently sold the property, and his vendees were made defendants to the suit.

1867.  
Crawford  
v.  
Armour.

Mr. *Spencer*, for the plaintiff.

\* Mr. *Scott*, for the defendant *Crawford*.

Mr. *Blain*, for the defendant *Armour*.

Mr. *Ferguson*, for the other defendants.

It was contended on behalf of the defendant *Armour* and his vendees, that the plaintiff by releasing the 100 acres, and thereby putting it out of his power to reconvey the whole mortgaged lands on receiving payment of the mortgage money, had deprived himself of the right to foreclose; and the *Bank of Montreal v. Hopkins (a)*, *Palmer v. Hardie (b)*, *Payne v. Compton (c)*, *Schoole v. Sall (d)*, and *Gibson v. Seaton (e)*, were cited in support of the argument.

Argument.

THE VICE CHANCELLOR gave judgment at the close of the argument. He was of opinion that *Armour*, having had notice through the registry of the two deeds relating to the 100 acres, was in the same situation as the mortgagor would have been in reference to the question; that it was the duty of the mortgagor, under his deed, to procure a release of the 100 acres

(a) 9 Grant 495; 2 U. C. E. & Ap. 468 S. C.

(b) 27 Beav. 349.

(c) 2 Y. & C. Ex. 457.

(d) 1 S. & L. 176.

(e) 20 Beav. 619.

1867. from the mortgage; that if he had redeemed the mortgage, he would not have been entitled to a reconveyance of the 100 acres to himself; or, if made to himself, it would only be in trust for *Alexander Crawford*; that, in conveying to *Alexander Crawford*, the mortgagee was, therefore, only doing what the mortgagor was bound to do; and that the right of the mortgagee to a foreclosure was, in these circumstances, not prejudiced by the conveyance.

Crawford  
v.  
Armour.

### GOWLAND V. GARBUTT.

#### *Mortgages.*

Where a mortgagee and mortgagor sell and convey part of the mortgaged property, without the concurrence of a person to whom, subsequently to the mortgage, the mortgagor had sold the remainder of the property, and whose interest was known to the mortgagee; and the mortgagee covenanted for freedom from incumbrances:

*Held* that, the mortgagee having thereby put it out of his power to re-convey the whole of the mortgaged property, he could not call on the owner of the remaining portion for payment of the balance of the mortgage money.

This rule does not apply where the sale is under a power contained in the mortgage, or where the mortgage is of chattels which a mortgagee has a right to sell without any express power.

But it applies to a sale under a decree in a suit to which the owner of the unsold portion was no party.

Where the mortgagee's right to claim a lien on the unsold portion has thus been put an end to, it is not revived by his two years afterwards obtaining the consent of the first purchaser to a reconveyance on payment of the mortgage money.

This was an appeal from the report of the Accountant.

Statement.

The suit was for the administration of the estate of *William Knaggs* deceased. By the report of the Master at Whitby, bearing date the 4th of October, 1864, it was, amongst other things, found that the

deceased, as surety for his son *George Knaggs*, had, on the 22nd of June, 1854, executed a bond in favor of *William James*, conditioned for holding *James* harmless in respect of a mortgage theretofore executed by *George Knaggs* in favor of *James Thompson* on property, twenty acres of which *George Knaggs*, subsequently to the mortgage, sold and conveyed to the said *William James*; and a lot of land mentioned in the instrument was thereby charged with any sums that should become payable under the bond.

1867.  
Gowland  
v.  
Garbutt.

By the decree on further directions, dated the 25th of April, 1865, it was (amongst other things) referred to the Accountant to inquire what, if anything, was due to *James Thompson* in respect of this mortgage. *Thompson* came in under the decree, and submitted to prove his claim against *James* in this suit, on condition that he should retain the same remedies against all parties, including the said *James*, that he would have on a bill filed by him, the said *Thompson*. An order to give effect to this condition was made on the 15th of May, 1866, by the consent of all parties concerned, except the infant parties to the suit, and on behalf of the infants the Court approved of the arrangement in order to save the expense of a suit.

Statement.

The facts appeared to be these : *George Knaggs*, being the owner in fee of fifty-five acres of lot No. 24, and twenty-three acres of lot No. 25, in the second concession west of Yonge street, in the township of York, on the 14th of January, 1854, executed a mortgage of both parcels to *James Thompson*, to secure £1100 and interest. On the 22nd of June, in the same year, in consideration of £200, he sold and conveyed twenty acres of the fifty-five to *William James*, covenanting to indemnify *James* against the appellant's mortgage; and the deceased gave the bond in question as a security for the same purpose.

1867.

Gowland  
v.  
Garbutt.

On the 28th of October, 1857, the mortgager sold and conveyed the remainder of the fifty-five acres, with other land, to one *Norman Milliken*, subject to the payment by *Milliken* of the mortgage to *Thompson*. The three first instalments secured by this mortgage were paid; but default being made as to the residue, *Thompson*, on the 21st of April, 1859, filed a bill against *Milliken*, whom the bill incorrectly alleged to be assignee of the equity of redemption of all the mortgaged premises, praying a foreclosure or sale. Neither *William James* nor the deceased *William Knaggs* was made a party to this suit. On the 24th of June, 1859, the usual decree was made for taking accounts and ascertaining whether there were any other incumbrances. On the 19th of May, 1860, the Master made his report, finding due to *Thompson* £827 12s. 5d., for principal, interest, and costs. *George Knaggs* and others were made parties in the Master's office, as subsequent incumbrancers. On the 10th of June, 1860, a decree was made on further directions for a sale of the property in case of default in paying the plaintiff and other incumbrancers; and in case the property did not bring sufficient to pay the plaintiff, *Milliken* was ordered to pay the deficiency. Default having been made, a final order for sale was obtained on the 8th of March, 1861. On the 28th of June following, an order was made on the plaintiff's application transferring the conduct of the sale to *Knaggs*, and giving *Thompson* the liberty to bid. It was known at this time to *Thompson* and his solicitor, that *William James*, and not *Norman Milliken*, was the owner of the twenty acres, and it was perceived that the twenty acres, therefore, could not be sold without making *James* a party to the suit; but, the remainder of the mortgaged premises being expected to bring the full amount due to *Thompson*, and a sale thereof in the absence of *James* not being supposed to release the twenty acres, the suit was proceeded with as it stood. On the 28th of September, 1861, the mort-

Statement.

1867.

Gowland  
v.  
Garbutt.

gaged premises, excepting the twenty acres, were accordingly sold to one *Benjamin Milliken* for £800, and a deposit of £80 was made on the purchase. On the 13th November following, a reference was ordered as to title, which was not finally disposed of until the 24th of November, 1863. One question raised by the purchaser on this reference was, whether a good title could be made in the absence of *James. Thompson* insisted that there could, and the Master so held. It appeared that the occupant of the adjoining land had been desirous of obtaining this property, and was prepared to pay the purchaser £1000 for it, cash, but on account of the delay in making the title, he bought elsewhere; and when the title was at length shewn, the purchaser at the Chancery sale was unable to pay the purchase money. Consequently, on the 24th of March, 1864, an order for a resale was made, and the former purchaser was required to make good any deficiency. The resale accordingly took place, on the 28th of May of that year, of the same premises, excepting as before the twenty acres; and *Henry Nicol* (now *Thompson's* father-in-law) became the purchaser at the sum of £500. This sale was in due course completed by conveyance and payment of the purchase money, the conveyance containing absolute covenants for title by *Thompson*. Both *Norman Milliken* and *Benjamin Milliken* were insolvent; when they became so, did not appear.

Statement.

On the 3rd of May, 1866, *Nicoll* entered into an agreement with *Thompson* to hold the property subject to the mortgage; *Thompson* on his part agreeing to pay *Nicoll*, on the 1st of March, 1867, the purchase money *Thompson* had received, with ten per cent. interest, and all costs, charges, and expenses occasioned by the purchase, and the value of all improvements made thereon since the purchase; and the agreement provided that if any dispute should arise as to the value of the improvements, the same should be decided by arbitration.

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Gowland  
v.  
Garbutt.

The Accountant, by his report dated the 29th of April, 1867, certified his opinion to be that, under the circumstances, the said *Thompson* had released the twenty acres from the mortgage, and had discharged the estate of *George Knaggs*, and that there was nothing due to *Thompson* in respect of the claim to indemnify *James* against which the bond was given.

Against this report *Thompson* appealed.

Mr. *Blain*, for *Thompson*.

Mr. *Ferguson*, for *Nicol*.

Mr. *Strong*, Q.C., and Mr. *S. Blake*, for the infant defendants.

Mr. *Roaf*, Q. C., for *William James*.

Mr. *Fenton*, for the plaintiff.

Statement.

Mr. *McLennan*, for other parties interested.

MOWAT, V. C.—The ground on which the report proceeds is, that, where a mortgagee has put it out of his power to reconvey the property mortgaged, or part of it, he is not entitled to sue the mortgagor for the mortgage money, and this was expressly held in *Palmer v. Hendry* (a). *Lochart v. Hardy* (b) supports the same view. I cannot distinguish the present from these cases.

That the sale and conveyance did prevent *James* from having a reconveyance of the property sold to *Nicol* in case he was desirous of redeeming, was at first assumed by both parties on the argument. I suggested some doubt on the point, but, on consideration, I concur in the view of it taken by the parties. It was the intention of all parties to the transaction that the property sold to

(a) 27 Beav. 349.

(b) 9 Beav. 349.

*Nicol* should be irredeemable; *Thompson* covenanted that the title was free from incumbrances; and *James* had no equity to insist on a conveyance of the property so sold, unless, in order to clear his own title to the twenty acres, he was called on to pay the mortgage money. By releasing or abandoning his claim on the twenty acres, *Thompson* had it in his power to make good his covenant to *Nicol*, and was, of course, bound to do so.

1867.

Gowland  
v.  
Garbutt.

It is argued, however, that, *Nicol* having subsequently entered into an agreement with *Thompson* to reconvey on certain terms set forth in the writing between them, *Thompson* is now in a condition to reconvey the whole mortgaged property. But this agreement was executory only, and *Thompson* has not hitherto complied with its terms. It does not, therefore, restore *Thompson* or *James* to the position either would have occupied if the sale had not taken place. The learned Counsel for the appellant stated, I think, that he was authorised by *Nicol* to say that on payment of the mortgage money by *James*, he would convey to him unconditionally the property. But assuming this to be so, mortgaged property cannot be redeemable and irredeemable, from time to time, and the mortgage debt discharged and revived, at the mere pleasure of the mortgagee and those claiming under him. The right to foreclose once gone is, I apprehend, gone for ever; and when it is considered that *William Knaggs* was a mere surety and that *William James* was in effect a surety (his land having been subject to the mortgage debt at the time of his purchase, but the seller having agreed to pay off the mortgage), it is too plain for argument that the liability of both *William Knaggs* and *William James*, if suspended by the sale to *Nicol*, cannot possibly be revived afterwards without their consent, even if the position of a mortgagor who was the principal debtor and not a surety, would be different.

Judgment.

The learned Counsel for the appellant referred to a

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sale by a mortgagee of land under a power of sale, and to a sale of a chattel by a mortgagee of chattels, as cases in which, confessedly, a sale of part is no release of the mortgage debt, or of the mortgagee's lien on the rest of the mortgaged property. But these cases have no analogy to the present. The mortgagee, in the cases put, exercises a right which, in the one instance, he expressly stipulated for, and, in the other case, the law gives him without any express stipulation. But the law, as recognised in this Court, does not give a mortgagee in fee, who has no power of sale, the right of selling the mortgaged property, without the consent of all parties interested; and a sale by the Court, in the absence of some of the parties interested in the equity of redemption, has no greater force against them than a sale out of Court.

Judgment.

Two cases, decided in this country, were cited as opposed to the cases before the Master of the Rolls — *Guthrie v. Shields*, by the Chancellor, and *Crawford v. Armour*, by myself, (a). In the former case I have ascertained from his Lordship that the point did not arise. Portions of the mortgaged land there had certainly been sold in an administration suit to which *Shields*, who had purchased part from the deceased mortgagor, was no party; and, amongst the portions offered for sale and knocked down to the purchasers, was the very land owned by *Shields* himself. The bill charged that all these sales were subject to *Shields's* interest. The sales were not completed, and conveyances were not executed. The vendees were parties to the suit against *Shields*, and no obstacle had ever been created by the mortgagee which prevented *Shields* from getting a reconveyance of all on paying the mortgage money; but he declined taking such a decree, and preferred that the sales should be carried out, and

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(a) Ante page 576.

the purchase moneys applied to redeem the mortgage debt, which was ordered.\* 1867.

Gowland  
v.  
Garbutt.

The misapprehension of the case by the learned counsel who cited it to me may have arisen from the fact, that there was a contention by *Shields* that the conduct of the mortgagee had discharged the mortgage; but the conduct relied on in argument for this purpose, as the Chancellor informs me, was the mortgagee's having proved his debt in the Master's office, which was unsuccessfully argued to have been an abandonment of his mortgage security. To this case the English authorities cited before me against the appellant did not apply, and they were not referred to. His Lordship was familiar with those cases, and he recognises their binding force.

In *Crawford v. Armour*, before myself, the decisions of the Master of the Rolls were, with other cases cited, Judgment.

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\* Upon the facts here stated appearing, the Chancellor said that,—looking at the proceedings that have been had in *Biggar v. Dickson*, and the admission that the sale of the property of the testator covered by the mortgage was made with the assent of the mortgagee, who is therefore bound to receive the mortgage money, and make good the titles of the purchasers, so far as he can, and that the piece of land purchased by *Shields* of the testator could not have been included in the sale, as it formed no part of the testator's estate,—I think the proper form of decree will be, to refer it to the Master to take an account of what is due on the mortgage: to credit thereon the proceeds of the sales of the mortgage property received or paid in: to find the total amount of the sales not paid: to declare that the defendant *Shields* is entitled to credit for these latter sums if paid or secured to be paid under any arrangement of the parties before the time fixed for redemption and fix that time; otherwise, foreclosure. Costs to plaintiff. *Shields* might have proved against the estate or perhaps have taken means to compel the executor to pay off the mortgage. Liberty to apply.

1867. and I had certainly no intention of overruling or disregarding them, but was of opinion that they did not apply; the release by the mortgagee in that case having been to a person to whom the mortgagor had sold the part so released, covenanting that it was free from incumbrances; and I thought a conveyance by the mortgagee in accordance with the obligation of the mortgagor did not prejudice the mortgagee's right to the mortgage debt, or his lien therefor on the remainder of the lands.

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v.  
Garbutt.

Judgment.

In the present case, I am of opinion that the Accountant's report is right, and that the appeal must be dismissed, with costs to the plaintiffs, to be paid by *Thompson*, this having been the agreement of the parties, as expressed in the consent order of the 3rd of May, 1866. The costs of the parties to the suit will be costs in the cause. I can make no order as to the costs of *James*. If he is entitled as against the estate to the costs of the inquiry, as his counsel contended, I presume these may include the costs of resisting the appeal, but I can decide nothing on that point upon the present motion.

### BROWNLEE V. CUNNINGHAM.

#### *Mortgages—Parol evidence—Costs.*

A decree was made for the foreclosure of a mortgage given for £100 with interest; it appeared by the defendant's evidence in the Master's office that no money was advanced by the mortgagees: and the Court held, chiefly on the conduct of the parties, and the circumstances of the case, that the mortgage was intended as a security for a note of the mortgagor's, indorsed by the mortgagees contemporaneously with the execution of the mortgage, and for any subsequent transactions with the mortgagor growing out of it.

Where an appeal from the report of the Master in a foreclosure suit failed on the main point, and succeeded only in respect of a small sum, the Court gave the respondents the costs of the appeal.

This was an appeal from the report of the Master at

Peterborough, dated the 1st of November, 1866, finding \$489.40 to be due to the plaintiffs for principal, interest and costs, on the mortgage in question in the cause, and appointing the same to be paid on the 2nd of May, 1867. Notice of appeal had been given on the 19th of June, 1867, and the argument took place on the 28th of the same month. The attention of the Court was not called to these dates, and it was assumed, therefore, that there had been an agreement to waive all objection to the lateness of the appeal.

1867.

Brownlee  
v.  
Cunning-  
ham.

The grounds of appeal were that the mortgage had been satisfied; that it was given to secure a note of £100 made by the mortgagor, *George Cunningham*, now deceased, and indorsed by the mortgagees for the accommodation of one *Bird*; and that this note had been paid; or that if anything was due, the amount was less by £6 and interest than the Master found.

Mr. *Hector*, Q. C., for the appeal.

Mr. *Crickmore*, contra.

MOWAT, V. C.—The mortgage bears date the 24th of March, 1858, and purports to be a security, not for any note, but for the payment to the mortgagees of £100, with interest, on the 23rd of May, 1859. The defendants gave parol evidence to shew the real nature of the transaction, which, no doubt, they were at liberty to do (a). This evidence shews that the mortgagees did not themselves advance any money to the mortgagor as the consideration for the mortgage; that the mortgagor wished to help one *Bird* to raise £100, and therefore gave the note and mortgage referred to, but there was no express evidence of the terms on which it was originally agreed that the mortgage should be held. The terms

Judgment.

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(a) Penn v. Lockwood, 1 Gr. 547.

  
 Brownlee  
 v.  
 Cunning-  
 ham.

1867. have to be inferred from the conduct of the parties and the circumstances of the case. The mortgagees do not appear to have been partners in business, and they indorsed the note severally. The money was obtained on it by or for *Bird* from one Mrs. *McKibbin*, to whom the note so indorsed was delivered. The note was payable one year after date; and, after it became due, *Bird* paid £40 on it to *John Harvey*, one of the mortgagees; the mortgagor signed a renewal note for £75 at six months, which the mortgagees indorsed as before; and by means thereof the first note was retired, the mortgagees retaining it, as well as the mortgage, in their possession. This second note is said by the bank agent to have been renewed from time to time, but the particulars of these subsequent renewals do not appear. On the 15th of September, 1864, *Bird* obtained from one *William Snyder*, for a debt due him by *Snyder*, a promissory note of that date for \$500, at three months. This note was delivered by *Bird*, or by his direction, to *Harvey*, who indorsed it upon an understanding with *Cunningham*, that the mortgage should remain in *Harvey's* hands as a security for the payment of the note; that *Harvey* should receive out of the proceeds the amount due on the old note, and that the balance should go on other transactions between *Snyder* and *Bird*. The *Snyder* note was discounted at the branch Bank of Toronto at Peterborough, *Cunningham*, *Harvey*, and *Bird* being all present at the Bank at the time. *Bird* says, that *Cunningham* received the proceeds, and subsequently paid over to *Harvey* the amount agreed upon: the old note and the mortgage still being left in *Harvey's* hands. *Snyder's* note was afterwards renewed in full, and was ultimately retired by *Harvey*, *Snyder* having become insolvent.

Judgment.

Now, what the appellants contend is, that under these circumstances the mortgage was a security for the first note of \$400 only; that that note has been paid;

and that the mortgage has thereby been satisfied, and cannot be held as a security for any part of the *Snyder* note. But, I am satisfied that, if I were so to hold, I would be defeating, instead of giving effect to, the original intention of the parties; and that I shall be carrying out the intention of the original transaction and correctly construing the whole evidence, by holding that the mortgage was given to secure the indemnification of the mortgagees, and each of them, in respect, not merely of the first note, but also of any subsequent transaction with the mortgagor growing out of it, whether in the shape of renewals, new notes, or otherwise. The parties have acted throughout as if this was the transaction, and I see no reason why I should not give that effect to the mortgage.

1867.

Brownlee  
v.  
Cunning-  
ham.

Judgment.

Before the *Snyder* note was made, the mortgagor had executed a second mortgage on the property in favor of the defendant *Blackett*, and he could not therefore increase the charge of the first mortgagee as against *Blackett*; but I see no reason why he might not agree that, if the mortgagee would indorse the *Snyder* note, he would pay out of the proceeds the amount due in respect of his own note; but that the same should not be a satisfaction of the mortgage; that the mortgage should remain a security for the amount until the *Snyder* note, or a corresponding portion of it, was paid (a); and this is proved to have been, in effect, the intention of the parties.

I think, therefore, that the Master was right in holding that the mortgage had not been discharged.

The appellants further contended, that the Master had improperly charged interest on the \$400 note from

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(a) *Thompson v. Wilson*, 1 U. C. C. P. 57; *Gibb v. Warren*, 7 Gr. 496; *Englis v. Gilchrist*, 10 Gr. 301; *Teed v. Carruthers*, 2 Y. & C. C. 31.

1867. Brownlee  
v.  
Cunning-  
ham. the date of it, though it was not payable with interest, and *Bird* swears that the interest was paid in advance, which is the course when a note is discounted. This appears to have been an oversight of the Master. On the other hand, the Master does not appear to have allowed for expenses of protests, or for the interest which would be paid in advance on the notes discounted. If the appellants think it worth while entering into the computations necessary to correct the report in these particulars, the Secretary will make the correction without a reference back to the Master.

The appeal having failed on the main point, and only succeeding as to this small sum, the plaintiffs must have their costs of the appeal.

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### TAYLOR V WARD.

*Practice—Foreclosure—Reference as to incumbrancers.*

In a foreclosure suit, where the mortgagor is the only defendant, and an immediate decree is taken against him, by consent, without any reference or day of payment, a reference cannot be directed as to other incumbrancers not named in the bill.

Statement. This was a foreclosure suit by the holder of a mortgage against the owner of the equity of redemption. \* At the hearing, the plaintiff asked an immediate foreclosure against the defendant on his consent, and a reference to the Master to inquire as to other incumbrancers, in order that they might have the usual opportunity of redeeming; and, in default, be foreclosed.

Mr. *Walsh*, for the plaintiff.

Mr. *R. Sullivan*, for the defendant.

MOWAT, V. C.—I do not think this reference can be granted. The bill says nothing of other incumbrancers, and prays for the foreclosure of the defendant. On his consent to be foreclosed without a reference or a day of payment, there is nothing more to be done. The reference respecting other incumbrancers is only made as incidental to the reference necessary in ordinary cases for the foreclosure of the mortgage; and where the latter reference is not made, the former, I think, cannot be made either. If there are other incumbrancers, the plaintiff must file a new bill against them, and I have no reason to think the expense of this course will be greater than of the course proposed by the plaintiff.

1867.

Taylor  
v.  
Ward.

### MCPHADDEEN V. BACON.

*Executors—Executor liable for default of co-executor—Executor discharging his own mortgage.*

One of two executors was indebted to the estate on a mortgage given to their testator, of which fact his co-executor was aware, but he took no steps to compel payment, and the mortgagor as executor executed a discharge of the mortgage, under the Statute, and registered the same:

*Held*, that the co-executor was liable to make good any loss occasioned to the estate thereby, (but)

*Quære* whether the discharge to be valid did not require the signature of both executors.

Executors suffered judgment to be recovered against them at law for a debt of their testator; and the lands were sold upon process issued thereon, although one of the executors was indebted to the estate, in a larger amount; the Court ordered both executors to make good the difference between what the lands were actually worth, and the amount realized upon the sale under execution.

The bill in this cause was filed by an assignee of a party entitled under the will of one *Sterling Pangman*. The bill was filed against *John Shier* and *Joshua Bacon*, the executors. The decree made was the usual administration one.

Statement.

1867.  
McPhadden  
v.  
Bacon.

Statement.

The cause came on to be heard on further directions on the 16th day of April, 1867. It appeared from the Accountant's report, that the executor *John Shier* in the lifetime of the testator had executed a mortgage to him, dated July 5th, 1856, to secure £900 payable in annual instalments of £100 each. The testator died in March, 1857. Among other bequests he gave to his widow two promissory notes of £100 each made by *John Shier*, which were alleged to be two instalments of the mortgage. These notes were paid to the widow. It further appeared that the executors had allowed one *Richard Shier* to recover judgment by default against them, and to sell all the testator's lands. The Accountant finding that the executor *John Shier* had sufficient moneys in his hands (including the mortgage debt) to pay this judgment, and that *Bacon* had taken no steps to enforce payment of the mortgage, and that the land had been sold at an undervalue, charged the executors with the difference between what the land sold for and what the land was worth. The Accountant also charged the executors with rents and profits which they ought to have received. It further appeared that *John Shier*, on the 27th of June, 1861, purported to discharge his own mortgage, and that the discharge had been registered. The Accountant charged the executors with the mortgage as if the money had been actually received. *Joshua Bacon* had not taken a very active part in the management of the estate, and had received and paid out very little.

Mr. *A. Hoskin* for the plaintiffs, asked that both executors should be ordered to pay the rents and profits and the difference in value of the land charged against the executors, and also the amount of the mortgage and the costs of the suit.

Mr. *Gwynne*, Q.C., for the infants.

Mr. *Moss*, for *Joshua Bacon*.

No one appeared for *Shier*.

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The following cases were cited : *Egbert v. Butter* (a), *Candler v. Tillett* (b), *Fozier v. Andrews* (c), *Eglin v. Sanderson* (d), *Mucklow v. Fuller* (e), *Lincoln v. Wright* (f), *Dix v. Burford* (g), *Toplis v. Hurrell* (h), *Wiard v. Gable* (i), *Gould v. Burritt* (j), *Chisholm v. Barnard* (k), *Williams v. Nixon* (l).

VANKOUGHNET, C.—I do not find enough on the Accountant's report to enable me to decide whether or not *Bacon* should be made liable for the mortgage debt of *Shier*, either entirely or to the extent of making him responsible for the unnecessary sale of the lands under execution at law. Except the debt due by the co-executor *Shier*, I do not find that there were sufficient funds out of which this judgment at law could have been paid. It is true that the will alludes to a debt of £200 due by *Shier* to the testator. Whether this formed part of the mortgage or not does not appear. It is not found by the accountant as an outstanding debt of *Shier* and may have been paid. On what principle the accountant has found the executors liable for rents, which but for their wilful neglect they might have received, I do not understand ; what they actually received, they are of course liable for. But they were in no way bound to look after the real estate ; and unless they assumed the control of it, in such a way as to make themselves responsible, I do not understand how they are charged. It is true that there is no exception to the Accountant's report, and that *Bacon* has confessed the allegations in the bill ; but notwithstanding that, I do not find enough

Judgment.

- (a) 21 Beav. 560.
- (c) 2 J. & La. 199.
- (e) Jacob, 198.
- (g) 19 Beav. 409.
- (i) 8 Gr. 458.
- (k) 10 Gr. 479.

- (b) 22 Beav. 257.
- (d) 8 Jur. N. S. 329.
- (f) 4 Beav. 427.
- (h) 19 Beav. 423.
- (j) 11 Gr. 523.
- (l) 2 Beav. 472.

1867. on the report to satisfy me either that he ought to be charged with the *Shier* mortgage, or with the loss on the sale of the lands, or with rents not received. He may never have known of the *Shier* mortgage. It is not shewn that he did or that he knew that the £200 debt of *Shier*, referred to in the will, formed part of it. I think the case must go back to the Accountant for further inquiry on these heads, and the whole matter will be thus thrown open. The Accountant treats the mortgage debt of *Shier* as lost to the estate; by the release executed by him in his own favour. My present opinion is that this release is invalid, and that it required the signature of all the executors. It is important to have the question distinctly presented on the report. So also with a view to *Bacon's* liability, it should be ascertained when, having regard to his first knowledge of this mortgage, the money secured by it could have been got in so as to have prevented the sale at law.

McPhadden  
v.  
Bacon.

Judgment.

Statement.

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The Accountant made a further report by which he found that the two notes given to the widow formed part of the mortgage debt; that the defendant *Joshua Bacon* was aware thereof and of the mortgage debt of *John Shier* at the time of proving the will. That on November 11th, 1861, he became aware that *John Shier* had discharged the mortgage; that he had taken no steps to secure or get in the same; that he was aware of the sale of the land about the time it took place; that the judgment could have been paid off, and the sale of the land prevented, had due diligence been used; that the executors had taken possession of the real estate in such a manner as to make themselves liable, not only for rents received, but also those which but for their wilful neglect and default might have been received; that *Joshua Bacon* had acted as an executor of the estate.

The case came on again for further directions, on the

31st of August, 1867, when the same counsel appeared for the parties respectively. 1867

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v.  
Bacon.

VANKOUGHNET, C.—I think under the Accountant's report in this cause, that *Bacon* must be charged, not merely with the amounts found against him in respect of rents and profits, by the Accountant, but also, with the loss on the sale of the lands under execution at law. It is a wholesome lesson to teach Executors, that if having assets of the estate out of which debts can be paid, they neglect to make such payment and allow the lands to be sold, they may be made liable for any loss occasioned thereby. I fear it is too common a thing for an executor to suffer judgment to go against him, and to allow on it, under the statute of George II., a sale of lands, thinking that because the estate in the lands is not in him, he need not trouble himself in the matter.

I must assume, in the absence of evidence to the contrary, that *Shier* was solvent, and that the amount of the mortgage money could have been collected from him. His co-executor entirely neglected this asset, and must make good any deficit arising on the attempt to realize it. See *Candler v. Tillett (a)*, *Hughes v. Simpson (b)*. Here *Bacon* allowed his co-executor to retain his own mortgage to the estate for years, and to deal with it. His duty was to secure the asset, and to realize it, and not leave it with his co-executor, whose duty and interest were in direct conflict. Judgment.

The order to be drawn up will direct *Bacon* to have the costs of passing his account ; to pay costs of inquiry into sale of lands at law and position of *Shier's* mortgage, but no other costs. These latter costs with the costs of the suit generally to be paid by *Shier* ; difference only out of the estate, as between solicitor and client ; and if the

(a) 22 Beav. 257.

(b) 22 Beav. 181.

1867. amount cannot be made out of *Shier*, to be paid out of estate ; *Bacon* to be charged with such sum as the *Shier* mortgage shall not realize, and realization thereof to be at his cost ; and if the same should be held to have been discharged by the release executed by *Shier* to be charged with whole amount ; to be also charged with loss on sale of lands at law, and with rents and profits charged against him by Accountant : *Shier* of course will be charged with everything.

McPhadden  
v.  
Bacon.

The plaintiff is only to have costs as between solicitor and client, subsequent to decree.

### DENISON V. DENISON.

#### *Undue influence.*

An elder brother, shortly after his younger brother came of age, induced him to purchase a parcel of land for \$10,000 : the younger brother filed a bill impeaching the transaction on the ground of improvidence and undue influence. The Court, on re-hearing, considered the plaintiff's evidence insufficient to sustain his case, and affirmed the decree of Spragge, V. C., dismissing the bill with costs. [Mowat, V. C., dissenting.]

This case was originally heard before Vice Chancellor *Spragge*, whose judgment dismissing the bill is reported ante page 114. The case was afterwards re-heard before the Chancellor and Vice-Chancellors.

Statement.

After the original hearing *Robert B. Denison* had made an assignment of his estate and effects under the Insolvency Act ; and the assignee was added as a defendant by amendment.

Mr. *Strong*, Q. C., and Mr. *Donovan*, for the plaintiff.

Mr. *Blake*, Q.C., for defendant *Bacon*.

Mr. *Wells*, for defendant *R. B. Denison*.

Mr. *Hodgins*, for the assignee in Insolvency.

VANKOUGHNET, C.—In this case I concur in the judgment of my brother *Spragge*, which we have had under review, and I find little to add to his narration of facts—to his conclusions therefrom—and to his statement of the law.

1857.

Denison  
v.  
Denison.

In all the cases, which I have seen, where a transaction of bargain and sale has been set aside, on the ground of influence arising out of confidence, or, to use the language of Sir *Samuel Romilly* in his celebrated argument in the case of *Huguenin v. Baseley* (a), “because of the relations of the parties being such that dominion may be exercised by the one over the other,” approved by Lord *Cottenham* in *Dent v. Burwell* (b), it has been shewn that this influence existed outside of the transaction in question, and was not evidenced by it alone, unless the whole train of circumstances necessarily established the existence of such influence, as in the case of *Huguenin v. Baseley*. I do not here mean the influence which a stronger will exercises over a weaker one, as, when the positions of the parties are so unequal that the Court comes to the conclusion that an undue advantage has been taken by one over the other; but, I refer to that species of influence which is begot by confidence, whether it arises out of certain known and fixed relations in which the Court assumes it to exist, without allowing it to be questioned, as in the case of guardian and ward, &c., &c., or of individual relations, created by the parties themselves, arising out of their mutual transactions in life, or their situation or conduct the one towards the other, as illustrated for instance by the case of *Harvey v. Mount* (c).

Judgment.

Now the influence which is mainly relied upon here as exercised by *Robert B. Denison* over his half brother,

(a) 14 Ves., 273.

(b) 4 M. & Cr., 277.

(c) 8 Beav. 439.

1867. the plaintiff, a man much younger than himself, and who had just attained the age of legal capacity, is that species of influence of which Sir *Samuel Romilly* speaks in the language which I have already quoted.

Denison  
v.  
Denison.

Judgment.

What evidence is there, here, of any such dominion exercised by *Robert* over the plaintiff; of any confidence reposed by plaintiff in *Robert* on any occasion; of any advice having been proffered by *Robert* to plaintiff; or of any opinion of *Robert's* ever sought for or acted on by plaintiff; or that *Robert* in any way interfered with the plaintiff's affairs; ever took the slightest interest in them, or in plaintiff himself; or ever shewed plaintiff even a kindness, such, as of itself, to inspire affection, or regard; or that there was even intimacy between them prior to the transaction in question; or that plaintiff even visited at *Robert's* house? There is a total absence of all such evidence; of even any brotherly love actually existing between them; (beyond the opinion of Mr. *Coates* and Mr. *Simms*, to which I shall refer presently), unless it is necessarily, or, of course furnished by the relation in which one half brother stands to another. My experience of human nature and life is, that such a relation does not, as a matter of course, give the elder brother influence over the other, where that other, as here, had been accustomed and was able to act and think for himself, and was not in the habit of leaning upon the elder brother's counsel.

The only evidence we have of any deference by the plaintiff to the defendant *Robert's* opinion or wishes is that already referred to as furnished by Mr. *Coates* and Mr. *Simms*. The former after stating that he and *Charles* had, together and before the purchase, visited the land, says: "I recollect *Robert* calling and taking *Charles* to see the land; *Charles* seemed to place great confidence in him; *Charles* was a person easily coaxed to do a thing." *Simms* says: "I think he (plaintiff) was satisfied with any deed that *Robert* was satisfied

1867.

Denison  
v.  
Denison.

with, he had such confidence in his brother." Neither witness gives us more than his opinion upon this head, or mentions any one circumstance to justify it. That *Charles* was not easily coaxed, is shewn by the evidence of other witnesses. I confess I place but little reliance on Mr. *Simms*' opinions. He is on bad terms with *Robert*. It is evident that he, while retaining in his possession as *Robert*'s solicitor, according to his own evidence, the deed to *Charles*, lent it to the plaintiff's solicitor here for the purpose of this suit; and the scrupulousness which led him to refrain from advising his brother-in-law, the plaintiff, not to enter into this transaction with his half-brother *Robert*, though, at the time he considered it, as he now swears, ruinous to plaintiff, forsakes him when he has a quarrel with *Robert*; and he then comes forward, and without any apology, even, for his breach of duty to his former client, not only gives evidence against him of what passed between themselves as solicitor and client, but furnishes information on which to frame the bill to upset a transaction which he as solicitor and otherwise aided in carrying out. I say, otherwise, for he actually lent the plaintiff the money wherewith to pay the first instalment on this "ruinous" purchase; and, not only did that, but assisted *Robert* to procure from *Charles* the order on the executors, which forms the subject of the suit and judgment which the defendant *Bacon* is now pursuing; and all this ruin and robbery Mr. *Simms* assisted in affecting under the obligation or pressure of that sacred relation of solicitor and client, for which he has recently shewn so little regard. It is at least as much to Mr. *Simms*' credit, to believe and assume that, between these two brothers, he acted as much for the one as the other in preparing the deed, which seems to have been the only professional act he discharged, and for which he, the brother-in-law of the plaintiff, and a connection of the defendant *Robert*, in a remoter degree, made no charge. According to his own evidence,

Judgment.

1867.

Penison  
v.  
Denison.

the sale of this land was talked over again and again in his presence and that of the family, and, according to the same evidence, he was the only one of them who expressed no opinion on it, one way or the other. He was content to let his own brother-in-law, a young man with whom he was on terms of the closest intimacy, who was naturally a constant visitor at, if not an inmate of his house, where he met his only sister, the nearest relative he had; he was content not merely to allow him to be ruined, but to assist in it; and now he seeks to undo it all, because he and *Robert* have had a quarrel. It was expected in the family that the plaintiff, to whom had been specifically devised by his father, property valued at \$40,000, would receive out of the residuary estate of his father, at least as much more; and it was thought by Mr. *Simms* at all events, that this residuary estate would shortly be divided; and one does not see what, at the time of the sale, existed to prevent a speedy division, which had only awaited the plaintiff's coming of age. It seems to me clear, that it was understood and agreed, that out of this residuary estate *Charles* was to pay the greater portion of the purchase money coming to *Robert*. The mortgages outstanding on the property were well known to *Charles*, the plaintiff, before he concluded the purchase. They were spoken of, Mr. *Simms* says, although he does not think that plaintiff was told that they were in suit for foreclosure; while at the same time, he says, that both before and after the sale, he, at the instance of the defendant *Robert*, endeavoured to effect an arrangement for time, a thing easily done by paying up the interest, which alone was in arrear, and which would not seem to the parties at the time to present, and ought not, with any management, to have presented any great difficulty to a person being in possession of, and shortly expecting, the property to which plaintiff was entitled.

Judgment.

The price agreed to be paid by *Charles* is sufficiently

commented on by my brother *Spragge*. I am certain no owner of property, so situated, would then or now take, and no one has taken less than £50 an acre for it. It is not a price which a speculator would give, lying out of his money until he found a purchaser for such a place ; but it is a price, which, I think, no one seeking a villa residence in that neighbourhood would hesitate to give. Nothing but *Robert's* necessities would have induced him to take less ; a forced sale might compel him to submit to a less price. Owners of land along side of it were holding it at a sum not less than £50 an acre. The plaintiff hears disinterested opinions of his brothers and relations on the subject, given at different times. He considers the matter for several weeks. He knows that at a forced sale but little will be obtained for the property. He thinks that he can afford to hold it, as his expectations of shortly getting his share of the residue of the estate, seem well founded, according to the then opinion of Mr. *Simms*, a Chancery Solicitor, who, interested in it, knew all about it ; and he thinks he will not lose by it, if he wants to sell it ; or that he can convert it into a residence for himself, having, out of his abundance of land, none so fit for that purpose ; and, then, to influence or give the turn to all these considerations, comes, if you will, that which would not exist in the case of a mere stranger, a desire, a natural desire, to serve or help his brother in his necessities, out of that plenty which he had, and reasonably expected to have. Is the influence of this better feeling, under such circumstances to be treated by this Court as so improper, that it must vitiate the transaction it touches or leads to ? Is a brother to be taught by a Court of Equity that all natural feeling or desire to give that aid to a brother on which a stranger could have no claim, must be banished, and that, if it be proved that a brother has made with a brother more favorable terms than he would have given a stranger, such a presumption of undue influence arises therefrom, that those terms cannot stand ? Shew

1867.

Denison  
v.  
Denison.

Judgment.

1867. me that the influence, the dominion thereof exists, otherwise, and then you establish the process on which to question the transaction; but from such a transaction as is the one here, you cannot, I think, draw evidence of that kind of dominion.

Denison  
v.  
Denison.

Judgment.

In the case of *Hunter v. Atkins* (a), Lord Brougham, a great master in the knowledge of human nature, its springs and motives, speaking of confidential relations and the necessity of removing their influence, before a transaction can stand, says that must be effected "so that the party may gain no advantage whatever from his relation to the other *beyond what may be the natural and unavoidable consequence of kindness arising out of that relation*"; and again at p. 142, "the two individuals however had, besides the intercourse of acquaintance and business, been united in very strict friendship for a period of above forty years. Their ages were very different; but they had been shipmates in former times, and the correspondence as well as the evidence shews, that there was no one for whom the veteran seaman had so great a regard as his ancient friend and comrade. If this bond may be said to have increased the alderman's means of influencing him, it opens on the other hand a source of kindness and preference altogether legitimate and pure. Indeed, this consideration goes further; it materially lessens the weight of any remarks that might arise upon the exercise of influence acquired by confidential employment; and further still, it even impairs the force of any inference to be drawn from the other relations in which the parties stood towards each other, in proof of the fact that such influence had been used; for it affords an explanation of the favour shewn, without having recourse to the supposition that the knowing or crafty counsellor had practised upon the less wary client."

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(a) 3 M. & K. at p. 135.

“That the Admiral had all along the feelings of kindness for Alderman *Atkins* to which I have alluded, there is abundant evidence.”

1867.

Denison  
v.  
Denison.

The doctrine, to which the plaintiff here appeals, is one of the most salutary and important in the jurisdiction of the Court. It is of infinite importance to the community. It rests upon that maxim of justice which affords protection to the weak and the confiding, against the strong and the designing. God forbid, it should ever lose any of its force. It had its lodgment in the Court from an early period, and has been recognised and enforced down to this day. It is not because I doubt the law, illustrated, as it is, by so many cases ancient and modern. It is not because I question its righteousness, or its value, that I decline to give effect to it here; but because, I think a state of facts has not, in this case, been established which warrants its application. The transactions subsequent to the sale in no way impair it. *Charles*, like many other men older than himself, had evidently a dislike for business; and, in view of his great expectations, then did things, which now appear very rash. A prudent business man, with the plaintiff's means, would not, I think, have had any difficulty in raising the money necessary to meet, for a time, until he could (as then expected) have got in his share of the residuary estate, the obligations imposed upon him by the purchase. The order, which he gave on the executors, was evidently only intended to be paid out of his share of his father's estate; and if the suit on it had been defended, I don't see how judgment could have been obtained. It was, from its form not a bill of exchange—at most it was evidence of a debt; but its terms, coupled with such evidence as has been given here of the fund out of which the money was to be paid, would have shewn that the action was premature. All this neglect of his own interests and rights after the sale was very unbusiness like, or even reckless; but *Robert* cannot be held responsible for that.

Judgment.

1867.

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v.  
Denison.

If the plaintiff could have succeeded on his *prima facie* case, it might have been difficult for him to get relief against the defence that he has allowed the property conveyed to him to slip away out of his control. See the case of *Western Bank of Scotland v. Addie* (a) in the House of Lords.

As against *Bacon*, the latter is a purchaser for a valuable consideration without notice. *Corbett v. Brock* (b), which was however not the case of a judgment, but of a mortgage.

*Robert's* necessities appear to have driven him to importune his brother to make this purchase, and, afterwards, to anticipate the payment, and, to harsh measures to enforce it; but I nevertheless look upon the plaintiff as a free agent throughout, though to those importunities, he most probably yielded, in a desire to serve his brother—if he acted on any such desire; but, as I have said at the outset, I do not see that he ever stood in a position or relation towards *Robert* by which the latter ever acquired the slightest dominion over his judgment, or actions, or even affections.

Judgment.

SPRAGGE, V.C., retained the opinion expressed by him on the original hearing.

MOWAT, V.C.—I respectfully think that the Chancellor and my brother *Spragge* have taken too favorable a view of the defence in this case.

The bill was filed on the 27th of January, 1865; and the object of it is, to be relieved from a purchase of fifty acres of land, which the plaintiff, three or four months after coming of age, was induced by an elder brother, *Robert B. Denison*, then forty-one years of age, to make from him at the price of \$10,000, or \$200 an acre.

(a) Law Rep., 1 Scotch Appeals, 145.

(b) 20 Beav.

The witnesses on both sides agree that this sum is more than could have been obtained for the property from any one else at the time, or for years before, or at any time since. The saleable value is variously estimated by the plaintiff's witnesses at from £10 to £25 an acre—from one-fifth to one-half of what the plaintiff was to pay. The defendants' witnesses do not say what sum could in their opinion have been got for the property; but four of them name £50 as a fair credit price; so that the maximum sum named by the defendants' witnesses falls short of the price which the defendants allege that the plaintiff was to pay—for their contention is that by the bargain he bought for cash, and not on time. Not one of these four witnesses, however, says that he would have given £50 an acre, or that any one else would have done so then; and, in naming that sum as the worth of the property, what they mean is, that an owner who had no occasion to sell, might refuse to part with the land for less, as they appear to be of opinion that, at some future day, prices will rise, and property of this description be sufficiently in demand to yield some such sum. A few credit sales of parcels of five or ten acres, situate half a mile or more nearer the city, at about that rate have, indeed, been proved; and a considerably larger sum is proved to have been offered in 1862 for one parcel of ten acres, situate half a mile nearer the city, by a gentleman who wished to build. Five acres of the property itself which is in question, have lately been sold at £40 an acre for a market garden, and £32 has been offered for the adjoining five acres. For farming purposes no witness suggests that the property in question was worth anything like £50 an acre. It is pleasantly and conveniently situated for country villas and market gardens, but the demand for these purposes is proved to be extremely limited; and in what time, if ever, the prosperity and increased population of the city and country will enable a holder to realise £50

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On the other hand, an estate, sworn to be more valuable, has been sold in parcels, on credit, at about one-fifth the rate the plaintiff was to pay.

The price the plaintiff was to pay was a speculative price, but was several hundred per cent more than any speculator would have given for it.

It is said that the plaintiff, in speaking of his purchase shortly after he had agreed to it, intimated to three or four persons that he expected to make a profit on it; and had been offered for a portion far more than he was paying; and that to a friend of the family, who said he thought the plaintiff had property enough, the plaintiff said he wanted this to build upon. These conversations have been put in evidence as material for the defendants. I think that, so far as they have any bearing, they assist the case of the plaintiff. They may indeed have been, on his part, merely idle talk, silly boasting,—a desire to make out, now that he had been prevailed upon to buy, that he had not been playing the fool. But if he spoke honestly in these conversations, what do they prove? From whom did he derive the views he expressed? Was it true that he needed the property? All the witnesses on both sides agree that he had no need of it: the defendants have made no attempt to prove that he had need of it for the purpose of building or any other purpose. Did he really refuse what he intimated in these conversations that he had been offered for part of the property? If so, the fact shews that he knew nothing of property or business, or of his own position—a view which is part of the plaintiff's own case. But the defendants have given no evidence to shew that the plaintiff ever had such an offer; and such evidence would have been far more to the point than any of the evidence they have given, as to the value of the property.

*Robert* held a conveyance of the equity of redemption, subject to two mortgages amounting together, with interest, to about \$5,000; and, as this sum undoubtedly exceeded what could have been got for the property at the time from any one else, *Robert* had no substantial interest whatever. He was therefore to get \$5,000, from his brother, for nothing, instead of giving for it, as his brother was made to suppose, a full consideration.

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The transaction was an improvident one for the plaintiff, even independently of this; for he had no ready money. His only means were, some real estate specifically devised to him by his father's will, and his share of his father's residuary estate. His real estate, though valuable, was unsaleable; and his father's estate, though large, was not ready for distribution, and was not when the case was heard, which was three years after the transaction in question. Consequently, the purchase terribly embarrassed the plaintiff. He was destitute of the business capacity or experience necessary to relieve himself; and, in his perplexity, and his boyish folly and ignorance, he left the Province, and remained away for a year; property that he had mortgaged to pay part of the purchase money was sold at a great sacrifice under a power of sale; and, on his return at Christmas, 1864, he found himself ruined.

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That no man of the smallest prudence, well advised, would, in his position, have bought, at the price and on the terms stated by the defendants, is perfectly certain; and the question is, Whether the plaintiff is bound by the purchase? The principal ground on which it is impeached is, that the bargain, being of this character, was brought about by undue influence on the part of his brother.

Now it is the well settled doctrine of Courts of Equity, that wherever a person obtains from another a

1867. considerable gift (a), or an improvident bargain, if he occupied towards that other a position which naturally gave him the confidence of the other, or a position which in any way gave him influence over the other, or which, for some other reason cognizable here, gave him an undue advantage, he must preserve evidence, not only of the due execution of the instruments that pass between them, but also that the other knew and understood what it was that he was doing; and that his consent "was not obtained by reason of the influence possessed by the person receiving the benefit." It is not sufficient to say that the other has not proved that the bargain was occasioned by such influence; for, as Lord Eldon observed in *Hatch v. Hatch* (b), "In discussing whether it is an act of rational consideration, an act of pure volition, uninfluenced, that inquiry is so easily baffled in a Court of justice, that, instead of the spontaneous act of a friend, uninfluenced, it may be the impulse of a mind misled by undue kindness, or forced by oppression." The party claiming the benefit of the transaction must further shew (c), "that the other had the fullest information on the subject; that he had separate, independent and disinterested advice, and that knowing all that he could know, and having the fullest information and this advice, he deliberately and intentionally made the grant," gift, lease (d), or bargain (e), which is in question. It is clear that the defendants have failed to give such evidence in the present case; but the preliminary question is, Did *Robert* occupy that position of advantage and influence towards the plaintiff which rendered such evidence by the defendants necessary?

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(a) *Rhodes v. Bate*, 1 Law Rep. Eq., 252.

(b) 9 Ves. 297. See also *Davies v. Davies*, 4 Giff. 417.

(c) *Hoghton v. Hoghton*, 15 Beav. 299.

(d) *Grosvenor v. Sheratt*, 28 Beav. 659; *Mulhallen v. Marum*, 1 B. & B.; *Gibson v. Jeyes*, 6 Ves. 276.

(e) *Holman v. Loynes*, 4 D. McN. & G. 283.

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The plaintiff's father died in December, 1853, when the plaintiff was but twelve years of age. His mother had died previously, his father's widow having been his father's third wife. The plaintiff's home thenceforward was with his stepmother. He had three half-brothers, of whom *Robert* was one; but *Robert* lived nearer than the others, and in fact on the same property as the widow, though not in the same house. The plaintiff was on terms of affectionate intimacy with him, and, living nearer than his brothers, *Robert* would naturally be to the plaintiff in *loco parentis*, more than either of his brothers would, or than any one else in the world could be. *Robert* had studied for the profession of a surveyor, had had considerable experience in business, had dealt in property, and was amongst other things valuer of lands for a public institution. The plaintiff, on the other hand, an orphan from an early age, had been brought up to no profession or business; had been an idle school-boy up to a year or two before he came of age; was badly educated, having always neglected his education, and been greatly given to horse-racing and other pleasures; and had for the last year or two, while living at home, been engaged in working on a farm belonging to another brother, *Richard*.

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Assuming the natural abilities of the two, the plaintiff and his brother *Robert*, to be about equal—as some of the witnesses say they were, and no witness says the abilities of the younger were superior to those of the elder,—still, twenty years' experience in the world would make a greater inequality between them, for the purpose of the transaction in question, than a considerable difference in mental capacity would alone have done; and, that, besides this inequality, the relation of the parties would naturally, under the circumstances I have mentioned, give *Robert* a considerable influence of the kind of which the books speak,—appears to me manifest.

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It is to be observed, that the relation of parent or guardian, of trustee or agent, of spiritual, legal, or medical adviser, or the like, does not always give an influence which would enable one occupying such a relation to obtain a gift, or the like, which a man, if well advised, would not otherwise have made; and that the ground of giving relief in such cases is not the certainty of undue influence having been exercised, but the danger of it. A fair, equal, and provident bargain, made by an elder brother with his younger brother immediately after the latter comes of age, may, without other circumstances, be unimpeachable: an unequal, improvident bargain, obtained through the importunity of the elder, stands in a very different position.

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To avoid repetition, I refer to the statement of the law, and of the authorities, which I had occasion to make with some fullness in *Clarke v. Hawke* (a), and other cases (b); and I shall confine myself now to an extract or two from the decisions of a learned Judge, not there quoted at length.

In *Cooke v. Lamotte* (c), which was the case of a bond obtained by a nephew from his aunt, we have this statement of the law by the Master of the Rolls: "The rule in cases of this description is this: where those relations exist by means of which a person is able to exercise a dominion over another, the Court will annul a transaction, under which a person possessing that power takes a benefit, unless he can shew that the transaction was a

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(a) 11 Gr. 542 to 553. See also *Dettmar v. The Metropolitan and Provincial Bank (limited)*, 1 H. & M. 656.

(b) *Mason v. Seeny*, 11 Gr. 447, 12 Gr. 143, S. C.; *McLaurin v. McDonald*, 12 Gr. 82; *Dawson v. Dawson*, *Ib.* 278; *McGregor v. Boulton*, *Ib.* 288; *Fallon v. Keenan*, *Ib.* 388; *Donaldson v. Donaldson*, *Ib.* 431; *Beeman v. Knapp*, 13 Gr. 398.

(c) 15 Beav. 239.

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righteous one. It is very difficult to lay down with precision what is meant by the expression, 'relation in which dominion may be exercised by one person over another.' That relation exists in the case of parent, of guardian, of solicitor, of spiritual adviser, and of medical attendant, and may be said to apply to every case in which two persons are so situated, that one *may* obtain considerable influence over the other. The rule of the Court, however, is not confined to such cases. \* \* \*

In this case, in accordance with the opinions I have stated, I propose to consider, whether it has been established that this lady, knowing what she was doing, voluntarily and deliberately performed the act: if the Court should be unable to arrive at a satisfactory conclusion upon the subject, one way or the other, the instrument cannot stand. It is not necessary for the plaintiffs to establish a direct case of fraud, but it is obligatory on the defendants, who claim benefits under the instrument, to prove that the transaction is one which the Court Judgment.  
will allow to stand."

So, in *Hoghton v. Hoghton (a)*, the same learned Judge made use of this language: "In such cases the Court watches the whole transaction with great jealousy, not merely for the purpose of ascertaining that the person likely to be so influenced fully understood the act he was performing, but also for the purpose of ascertaining that his consent to perform that act was not obtained by reason of the influence possessed by the person receiving the benefit; not that the influence itself, flowing from such relations, is either blamed or discountenanced by the Court; on the contrary, the due exercise of it is considered useful, and advantageous to society; but this Court holds, as an inseparable condition, that this influence should be exerted for the benefit of the person subject to it, and not for the advantage of the person possessing it."

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(a) 15 B. 299.

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These observations are in exact accordance with numerous other authorities.

It is also to be observed, that the plaintiff, as a young heir, inexperienced in business, was just in that situation in which, in view of Courts of Equity, he stood in special need of the counsels of others, both before he engaged in such a transaction, and afterwards in carrying it out, and which made it of the greatest importance to him that he should not be induced to enter into any important pecuniary engagement that he had not the money to meet. In reference to such persons Lord Eldon, in *Walker v. Symonds* (a), pointed out, "That the protection of the Court to infants is continued after they have attained twenty-one, until they have acquired all the information which might have been had in adult years." There are observations to the same effect in *Dawson v. Massey* (b): "Generally speaking, there are no transactions of a man's life that ought to be in this Court more scrupulously, or with more jealousy examined, than those which occur recently after he attains the age of twenty-one. As if he had acquired all the prudence and experience necessary to the management or disposal of his property, with the possession are given the absolute control and dominion over his estates. At law all his acts are binding, all his deeds are valid, unless upon some distinct case of fraud they can be impeached; but it is not so in this Court." In *Osmond v. Fitzroy* (c), one of the grounds for setting aside a voluntary bond given by a young lord, twenty-seven years of age, to his servant, or rather travelling companion, for £1000, during the life of his father, was, that he was unable to raise that amount, and that it was an exorbitant gift for one who had at the time no means of paying it. A purchase by a near relative,

(a) 3 Sw. 68, 69.

(b) 1 B. & B. 232.

(c) 3 P.W. 131. See also, per Lord Keeper Henly, in *Carpenter v. Herriott*, 1 Eden. 338, 341.

from a young heir, for a sum which the latter has not the means of paying, is equally objectionable. 1867.

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My brother *Spragge* observed in his judgment on the hearing, in reference to the two brothers, that "their relative position and age were such as to make influence and ascendancy very probable on the part of the elder. But as the younger grew up to man's estate, the difference between them would become less and less; still a considerable degree of influence might remain, and it is the duty of the Court to look with careful scrutiny at the dealings between parties so situated" (a).

Now, this sort of influence is abundantly sufficient, on the authorities, to throw on the defendants the burden of proof of full information and advice, and to demand that such proof, if given, should be carefully scrutinised. But there is also both general evidence that the plaintiff was in fact very open to influence on the part of this brother, and particular evidence, in the circumstances connected with the transaction itself, of the confidence the plaintiff reposed in him, and of the extent to which *Robert* exerted his influence to bring about the bargain. Judgment.

As to the general evidence, Mr. *Coates* says: "*Charles* (the plaintiff) seemed to have great confidence in him (*Robert*). \* \* *Charles* was on good terms with his other brothers. I think *Robert* could persuade him more than the others." Mr. *Simms* speaks to the same point. [Here the Vice-Chancellor remarked, that he thought the Chancellor had been rather hard on Mr. *Simms*, in the judgment which his Lordship had just given; that Mr. *Simms* had not said in his evidence that he thought at the time, the transaction from which he had not dissuaded the plaintiff would ruin the plaintiff. What Mr. *Simms* did say was, that "he thought the transac-

1867. tion a ruinous one for any one with moderate means to enter into." But the plaintiff's share of his father's residuary estate was alone \$40,000, and Mr. *Simms* understood the proposal to be that plaintiff was to pay the \$10,000 from this source when received, and, therefore, the witness could not mean or suppose that such a payment would ruin the plaintiff. Mr. *Simms* did think the price large, though the loss on it would not be of much moment to the plaintiff, while *Robert* represented "that it would save him (*Robert*) and his family from ruin." When, however, contrary to what was understood to have been the agreement, *Robert* did not wait until the plaintiff received the money from the residuary estate, but allowed the plaintiff to be sued on the accommodation notes which the plaintiff had indorsed for *Robert*, and on the order which the plaintiff had been induced to give on the executors, though the plaintiff had no present means of paying; Mr. *Simms* justly thought the plaintiff 'badly used' in these matters, and was willing to afford him any assistance or information in his power—a feeling at which the Vice-Chancellor did not wonder; his Honour would have thought more unfavourably of him if, under the circumstances, Mr. *Simms* had not had such a feeling. That both he and Mr. *Coates* should have become indignant at *Robert's* conduct, and should now be sympathizing with his brother—was natural and creditable to them. Vice-Chancellor *Spragge* in his judgment had relied on the statements of Mr. *Simms*, as well as of Mr. *Coates*; and he (Vice-Chancellor *Mowat*) saw no reason for not giving credit to both. The Vice-Chancellor then proceeded with his judgment as follows:] Mr. *Simms* says: "I think he (*Charles*) was satisfied with any deed *Robert* was satisfied with, he had such confidence in his brother. \* \* No bargain which they might have come to would have surprised me." On the other hand, all that Mr. *Richard Denison*, who was called by the defendants, says, is: "I don't think from his disposition *Robert* could influence him

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*much.*" Mr. *George Denison* says: "*Charles*, like other young men, was liable to be influenced by others, but (he adds) I do not think he would be likely to be influenced by *Robert*. Since he came of age I do not think he was likely to consult any of his brothers." The reasons for this opinion as to the brothers are not given, and the opinion does not seem to be of much consequence to the issues in this suit. The plaintiff was on terms of affectionate intimacy with all his brothers.

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Then, it is clear that the bargain was at the instance of *Robert*; that the plaintiff did not need this property; that he had plenty of other land; that he did not wish to buy; that he did not entertain the proposal to buy until it was repeatedly and perseveringly pressed upon him by *Robert*; that to induce him to buy, *Robert* endeavoured to enlist other members of the family to exert their influence with the plaintiff; that amongst these was Mr. *Simms*, who was also *Robert's* solicitor; that *Robert* took the plaintiff to see the property; that he represented to him that the sale of it was absolutely necessary to save *Robert* and his family from ruin; and that it was a pity so fine a property should go out of the family: that by these daily appeals to the plaintiff's brotherly affection and sympathy, and to his family pride, *Robert* brought to bear on him all the influence which *Robert's* relationship and position enabled him to exert, and all the moral pressure of which the case admitted; giving the plaintiff no peace until he had overcome the plaintiff's reluctance to buy, and the influence of those of his relatives who advised him not to purchase. I cannot imagine greater evidence that the plaintiff could have furnished of the influence of *Robert* in the transaction than his success in thus inducing the plaintiff to yield to his wish, and credit his representations, in spite of the unfavourable opinion of other members of the family who had no such interest in the proposal as *Robert*

1867. had, and in spite of the plaintiff's reluctance in the first instance to buy. The plaintiff does not appear to have made any inquiry whatever out of the family as to the value of the property, or the propriety of making the purchase.

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But the case abounds in proof of the confidence which the plaintiff had in *Robert*; and of the influence which *Robert* had over him; though confidence itself is held to imply the opportunity for influence, and when established dispenses with any more direct proof of influence.

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A few days before the purchase was agreed to, *Robert* had ascertained from his brother *George* that he did not think the property was worth \$200 an acre; and we find *Robert* telling the plaintiff by no means to consult *George*, but that *Richard* would give him good advice. *Robert* had at one time suggested to the plaintiff to consult both his brothers; but I think the proper inference from the whole evidence is that this was an earlier suggestion, and that he withdrew his recommendation as to his brother *George* after hearing his opinion as to the value of the property, and before the plaintiff had spoken to *George* on the subject. Now, *George* was a lawyer, and an executor of his father's will, and, therefore, in some important respects, a most proper person to consult before making such a purchase. He was also of opinion that their father's estate could not be wound up for three or four years; while other members of the family supposed it could be wound up, and the shares of the residuary legatees realised, immediately, and it was on this assumption that *Robert's* negotiations with the plaintiff proceeded. But the plaintiff, having been advised by *Robert* by no means to consult *George*, did not consult him until after he had bought. This was a most material circumstance in regard to which *Robert's* influence was shewn; and, considering the relationship of the parties, is of itself fatal to the defence.

Again, the plaintiff employed no lawyer to look into the title on his behalf to the property for which he was to pay this large sum, having confidence in his brother and his brother's solicitor that what the brother was selling he owned; and it is to be observed that the property was not a family property—*Robert's* title was under a mortgage executed in the previous July, and a release of the equity of redemption which he obtained after commencing his negotiations with the plaintiff. The plaintiff paid *Robert* \$400 or \$420 on account of the purchase money soon after the bargain, and took no receipt for it. He also agreed to indorse notes for *Robert* on *Robert's* verbal promise to retire them at maturity, upon an understanding, of which he had no witness, that, if *Robert* made default, the plaintiff should be entitled to deduct from the purchase money of the property, the amount he should have to pay on the notes, and all extra interest and costs to which he should be put. The plaintiff allowed the conveyance to be drawn by *Robert's* solicitor, on instructions from *Robert* himself, given in the plaintiff's absence,—and which instructions, I may add, were either wrong or misapprehended, for Mr. *Simms* understood that the plaintiff was to give \$10,000 for the equity of redemption only, and drew the conveyance accordingly. The conveyance was executed when the plaintiff was not present, and he does not appear to have ever read it, nor did any one on his behalf, until after this suit was brought, the plaintiff being satisfied, as Mr. *Simms* deposes (and all the facts of the case confirm the statement), with any deed that *Robert* was satisfied with. Again, on the 6th May, 1863, at the instance of *Robert*, the plaintiff gave him an order on the executors for \$2,158, said to be the balance of the purchase money, but which is proved to have been considerably more than the balance. This order the executors did not accept, and *Robert* afterwards sued the plaintiff on it, and got the judgment which he subsequently assigned to the defendant *John Bacon*.

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1867. For this order, or for the notes previously indorsed, the plaintiff got no receipt. All these transactions took place without the plaintiff's consulting anybody, and are additional illustrations of his confidence in his brother, and of his ignorance of business matters.

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The confidence in *Robert* with which the plaintiff was acting, was further manifested by his acquiescing in the solicitor's retaining the conveyance unregistered, notwithstanding the payment of the \$400, the indorsing of the notes, the giving of the order, and *Robert's* embarrassments.

In fact, after being brought to the point of thinking the purchase a good one, and agreeing to it, the plaintiff appears to have yielded every thing else that *Robert* desired, consulting nobody; and on the other hand, *Robert*, pressed and blinded by his necessities, took advantage of his brother's inexperience and confidence, to an extent that, under other circumstances, he could not himself but have felt to be very wrong.

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The difficulty that *Robert* had in inducing his brother to buy is relied on as an evidence that they dealt as strangers. But to entitle a party to impeach a deed, it has never been held necessary to show that the influence was so great as to have brought about the impeached transaction at once and without any resistance. I have met with no trace of such a doctrine in any of the cases, and it appears to me in direct opposition to the spirit of all the authorities; for in these the party supporting such a transaction usually endeavours to make out that the party impeaching it was the party to propose it; that the suggestion came from him, or that he acquiesced in it readily. The necessity of pressure to induce him to agree, is the very thing which, of all others, defendants endeavour in such cases to negative, instead of supposing it to be in their favour. In *Sharp*

v. *Leach* (a), which was between a sister and brother, the Master of the Rolls directly held the importunity with which the transaction had been pressed upon the plaintiff, notwithstanding her repeated objections and refusals, to be, not evidence that supported the transaction when at last agreed to, but additional evidence of the influence by means of which the plaintiff charged that she had been brought to agree to it (b).

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Some express evidence of confidence or influence, outside of the impeached transaction, is asked for on the part of the defendants. But the sufficiency of evidence, afforded by the transaction itself and the circumstances connected with it, has often been maintained (c), and has never before, that I know of, been questioned. Confidence or influence in other transactions is only material as leading to the inference that there was such confidence or influence in the transaction impeached; and if such evidence is to be found in that very transaction, instead of its being insufficient, such evidence is, in my judgment, more satisfactory than the other.

Judgment.

I think it clear, therefore, that the relation of the parties is sufficiently proved to have been one of confidence and influence, within the meaning of the cases relied on by the plaintiff; that but for that confidence and influence, the purchase complained of would never have been made; and that the plaintiff is entitled to the protection of those rules which apply where there is a fiduciary relation between the parties.

The defendants, for example, must prove what the actual contract was, and that the plaintiff understood it fully and correctly.

(a) 31 Beav. 491.

(b) See *Rhodes v. Bate*, Law Rep. 1 Ch. App. 252.

(c) Vide *Huguenin v. Basely*, 14 V.; *Sharp v. Leach*, 31 Beav. 419; &c.

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Now, as to what the contract was—the plaintiff says in his bill, that there was a writing, that it was drawn by his brother *Robert*, and that it was signed by the plaintiff, but that it did not state the bargain as it really was. The answer of *Robert* admits that he did put in writing the agreement; states that both he and the plaintiff signed it; and asserts that it was thereupon delivered to Mr. *Simms*, and that he has retained it in his possession ever since. Mr. *Simms*, however, says he never received or saw such a writing; and there is no other evidence of it. My brother *Spragge* was satisfied that the agreement never had been reduced to writing; and, considering the relation of the parties, and the circumstances of the case, the absence of any writing, shewing distinctly and accurately all the particulars of the bargain, is of itself almost, if not quite, conclusive against the defendants (*a*).

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Further, no one appears to have been present when the bargain was concluded, and no one is able to state its terms, except as they may be inferred from the conversations and conduct of the parties, and the circumstances of the case. The deed is not signed by the plaintiff, does not correctly shew even the amount to be paid, and does not state how it was to be paid; and the defendant *Robert* never signed any paper shewing the payments made, or the notes indorsed by the plaintiff, or acknowledging the order given in respect of the purchase money. All this, in a case like the present, is very bad.

But I must say also, that I have no doubt whatever that the basis of the bargain was, that the money should be paid out of the plaintiff's share of the estate of his father, when it should be realized; that a personal

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(*a*) *Ahearne v. Hogan*, Dru. 326; *Dawson v. Massey*, 1 B. & B. 219; *Harvey v. Mount*, 8 Beav. 439; *Dent v. Bennet*, 4 M. & C. 272, 273; *Bowen v. Kirwan*, Ll. & G. t. Sug. 66; *Gibson v. Russell*, 2 Y. & C.C.C. 104; *Huguenin v. Baseley*, 14 Ves. 273, 301.

liability beyond this was not proposed or contemplated; that an obligation to raise the amount as best he could, or to submit on default to have his property seized and sold by the Sheriff, was not only not involved in the bargain, as the plaintiff understood it, but was diametrically opposed to what was so understood; and that a bargain involving that obligation would not for a moment have been entertained by the plaintiff, and would have been actively opposed by his friends. A gift of \$6000 or \$7000, out of the \$40,000 supposed to be coming to the plaintiff from his father's residuary estate, to save a brother and his family from ruin, might have been a becoming thing for the plaintiff to do, if he had chosen to make such a gift; but to assume a personal liability to pay \$10,000, or half that sum, forthwith, would, in his position, have been a transaction which no just sentiment of fraternal regard called for, and which it would have been a cruel thing on the part of his friends to suffer.

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Judgment.

The evidence of the bargain is this: Mr. *Coates* says: "I understood that part of the purchase money was to be paid down, and the rest out of the estate or otherwise, as *Charles* could get the money. He had no other means than the estate." This sum to be paid down was \$400 or \$420, which the plaintiff accordingly paid to *Robert* in the latter part of November, 1862. Mr. *Coates* also thought from the conversations between the plaintiff and *Robert* which he had heard, that *Robert* was to pay off the mortgages. Mr. *Simms* deposes that "he (*Robert*) expected to get about £100 down, and that the balance would be got out of his father's estate. He said *Charles* would be getting a large sum out of his father's estate. \* \* What he proposed was, that *Charles* should pay about £100 down, and that the balance should be paid out of the estate. *Robert* proposed this, and *Charles*, as I understood, assented to it. The mortgages were men-

1867. tioned by *Robert* to *Charles*. Nothing was said about their being a suit for foreclosure pending. \* \* *George T. Denison* (the executor) had stated that the estate would not probably be wound up for four or five years, but I thought the estate would be amicably wound up very soon, and that *Charles* (the plaintiff) would then be in receipt of a large sum of money. In this expectation we were disappointed. This put off day of payment of land. Nothing was said about accommodation paper being given by *Charles*, before instructions for deed. \* \* I do not think *Charles* was the party to pay these notes. \* \* I thought *Charles* badly used in the matter of the notes not being retired, and the order being sued upon."

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v.  
Denison.

Judgment. If the bargain, as intended by *Robert*, was really a payment in cash, and not merely as it could be got from the estate, the terms were not so understood by the plaintiff, or by Mr. *Simms*, or by Mr. *Coates*, or by any one, in fact, who had heard the transactions between the parties; and the case is far worse against the defendants than if they had merely failed to shew that the plaintiff understood the bargain as alleged by the defendants. And yet such failure alone would, upon the authorities, have put an end to the defence.

Again, there is no evidence that the effect of the order on the executors was explained to the plaintiff. All that this paper purported to do was to request the executors to pay the amount. If the law, as administered in Courts of Common Law, annexes to such a document a personal liability on the part of the drawer in case of its non-acceptance, he had certainly up to this time not been so liable, by any instrument or otherwise. He signed the order at the request of his brother, without any professional or independent advice; and my own strong belief from the evidence is, that he had no idea

of thereby assuming a personal liability. But it is enough to say that the defendants have failed to prove that this effect was explained to him and understood by him, though it was the effect of it afterwards successfully insisted upon by *Robert*. If, notwithstanding *Robert's* success in this respect, the order did not create a personal liability at law, what took place shews that even after the time the action was brought, the plaintiff was without competent legal advice still. Had he consulted a competent, professional, or other (a) independent adviser throughout the transaction, this is one of many matters on which it would have been the duty of his adviser to inform and advise him fully and accurately.

1867.

Denison  
v.  
Denison.

To enable his brother to maintain the transaction against him, the plaintiff should likewise have had, and the defendants should be in a position to prove that he had had, all the information we have now affecting the value and saleableness of the property, and the position of his father's residuary estate—on which he was relying, as his brother knew, for paying the purchase money.

Judgment.

In fact, there is so much that the plaintiff should have had full information and advice upon, which either there is no evidence that he knew or understood, or there is express evidence that he did not know or understand, that it would be tedious to attempt enumerating all in detail. The onus was on the defendants of shewing that the plaintiff had full information and advice on every point of the transaction on which such information and advice could have been material or useful, and there is hardly one point on which he can be said, upon the evidence, to have had this advantage.

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(a) *Cook v. Lamotte*, 15 Beav. 243, 247; Vide also *Berdoo v. Dawson*, 11 Jur. N. S. 255.

1867.

Denison  
v.  
Denison.

The case was argued on the part of the defendants as if, in having had the advice of several members of the family not to buy, the plaintiff had all the advice which the Courts require in such cases; but no authority was cited for such a contention; and the authorities are clear the other way. These persons were not either the independent or the competent advisers, and the general advice they gave was not the due advice, which the rule requires.

The persons who advised him were his half-brother Mr. *Richard Denison*, his step-mother, his half-sister Mrs. *Coate*, and her husband. My brother *Spragge*, by an oversight, says that Mr. *Simms* and Mr. *George Denison* also advised the plaintiff against buying. Mr. *Simms* expressly swears he did not advise him either way; and Mr. *George Denison* states that in the conversation he had with the plaintiff it came out that he had already bought.

Judgment.

All that the plaintiff asked *Richard* was, what the property was worth. That was the single point on which he wished an opinion, and *Richard* in his evidence "cannot say the plaintiff came to consult him as to the purchase; rather it appeared as if he wished to break the subject to him;" and I am not at all sure that this conversation was not, like that with *George*, after the purchase, and not previous to it. *Richard*, in answer to the plaintiff's question, told him he thought the property "well worth £50 an acre." He told him nothing more on that point, but he advised him not to buy because he had land enough. That was the only reason he suggested why the plaintiff should not buy; and if the property was really well worth the sum stated, the reason thus suggested was one which could do nothing against the powerful considerations of fraternal affection and sympathy, not to speak of family pride, with which *Robert* had been earnestly and perseveringly filling the plaintiff's mind.

The plaintiff's step-mother and sister appear to have given their opinions unasked, on hearing the matter talked of; and I dare say the plaintiff did not consider that they knew more about such matters than himself; and I have no reason for supposing they did.

1867.

Denison  
v.  
Denison.

*Richard Denison* was more nearly related to *Robert* than to the plaintiff, for he was the full-brother of *Robert* and but the half-brother of the plaintiff; Mr. *Coates* was married to the full-sister of *Robert*, the half-sister of the plaintiff; and all the members of the family were, no doubt, under the influence, more or less, of those appeals which *Robert* addressed to the plaintiff. None of them knew anything more of the contemplated bargain than the proposed price. All were ignorant of many of the circumstances which the plaintiff should have had communicated to him; and he did not in fact obtain from them the full information and advice necessary to sustain the transaction.

Judgment.

To shew that I do not overstate the rule of equity as to the extent to which the defendants' evidence of the plaintiff's knowledge, information, and advice, must go, if they are bound to give such evidence at all, I shall refer to the illustrations of the rule afforded by some of the decided cases; for it is of great importance that the rule should be well understood, enforcing as it does, to use the language of learned Judges, a principle of high morality, in the exercise of one of the most important parts of the jurisdiction of this Court (*a*).

I shall, for this purpose, cite, indifferently, cases where the Court inferred confidence and influence from the mere relationship of the parties, and cases in which the confidence and influence were inferred from other cir-

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(*a*) *Cooke v. Lamotte*, 15 Beav. 241; *Maitland v. Backhouse*, 15 Sim. 63; *Billage v. Southee*, 9 Hare, 540.

1867. cumstances, or were expressly proved; for the confidence and influence being once made out, whether by implication of law, by inference, or otherwise, to use the words of Lord *Kingsdowne* in enunciating the view of Equity Courts on this point, "the rules of reason and common sense, and the technical rules of a Court of Equity, are just as applicable in the one case as in the other" (a). So, gifts, and transactions for a consideration paid or payable to the party impeaching them, are for this purpose on the same footing (b).

Denison  
v.  
Denison.

Judgment. In *Huguenin v. Baseley* (c), the deeds were set aside though the grantor had the advice of his own attorney, and though her own attorney drew the deeds. Lord *Eldon*, referring to this, remarked: "The attorney was struck with the circumstance of her making an irrevocable deed, and told her that she should make a will. \* \* I am bound to look at all the circumstances that led to the execution of a voluntary instrument, and to observe that the attorney did not state this improvident act to the brother of the lady. \* \* What she said to him (the attorney) must have suggested to him a reason for resisting more strenuously. The Court cannot pay attention to such circumstances as are alleged upon this part of the case." His Lordship subsequently puts the question thus: "Whether she executed these instruments not only voluntarily, but with that knowledge of all their effect, nature, and consequences which the defendant *Baseley* and the attorney were bound by their duty to communicate to her before

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(a) *Smith v. Kay*, 7 H. L. 779.

(b) *Holman v. Loynes*, 4 D. M. & G. 283; *Dawson v. Massey*, 1 B. & B. 219; *Pickering v. Pickering*, 2 Beav. 31; *Mulhallen v. Marum*, 3 Dr. & War, 317; *Gresley v. Mousley*, 4 DeG. & J.; *Grosvenor v. Sherratt*, 28 B. 659; *Longmote v. Ledger*, 2 Giff. 63; *Clark v. Malpas*, 31 Beav. 81; *Baker v. Monk*, 33 B. 419; S. C. 10 Jur. N. S. 691, on Appl.; *Rhodes v. Bate*, 1 Law Rep. Ch. App. 256.

(c) 14 Ves. 296.

she was suffered to execute them; and though, perhaps, they were not aware of the duties which this Court required from them in the situation in which they stood, where the decision rests upon the ground of public duty, for the purpose of maintaining the principle it is necessary to impute knowledge which the party may not actually have had."

1867.

Denison  
v.  
Denison.

*Dawson v. Massey* (a) was a case of leases obtained by an uncle from his nephew; and the decree was for the plaintiff, though he had had a separate agent and adviser, appointed by himself independently; and he and this agent had visited and inspected the property, and received and rejected some other proposals to lease the same, before giving the leases to the defendant.

In *Pickering v. Pickering* (b), also, the party whose representative impeached the settlement, had a separate solicitor in the transaction; and this solicitor appears to have had a knowledge of all the facts; but as his attention was not called by the defendant or otherwise to some material matters which he ought to have considered, and as the settlement was injurious to his client, the Court held that the duty of the defendant, to shew that the transaction had been entered into with sufficient advice, was not discharged; and the decree was for the plaintiff.

In *Hatch v. Hatch* (c) the grantor had an attorney. The details of what the attorney did or urged are not given; but Lord *Eldon* observed: "Upon her attorney also there was a duty which he most grossly violated."

In *Mulhallen v. Marum* (d), Lord Chancellor *Sugden*

(a) 1 B. & B. 219.

(c) 19 Ves. 296.

(b) 2 Beav. 31.

(d) 3 D. & War., 317.

1867. set aside a lease made by a young man, on the ground of influence and improvidence, though he had had the services of the family solicitor, and the solicitor had never before acted for the lessee individually, the Lord Chancellor observing that the solicitor was more likely to be directed by Mr. *Marum*, who was the lessee and the plaintiff's brother-in-law, than to be influenced by a determination to oppose him and protect the plaintiff. A settlement was executed contemporaneously with the lease, and acknowledging its validity; one of the trustees being a gentleman who had been one of the plaintiff's guardians; and this trustee executed the settlement. But the Lord Chancellor held that no weight was due to this circumstance, either. The trustee was dead when the suit was brought.

Denison  
v.  
Denison.

Judgment.

In *Sturge v. Sturge (a)*, the Master of the Rolls was of opinion that, in the circumstances in which the defendants were placed, it was their duty "to see, and be able to shew, that the plaintiff did in fact receive and act upon independent advice as to his rights, and that he parted with his rights with knowledge and due deliberation." The defendants' solicitor proved that he had advised the plaintiff to consult some other professional person respecting the construction of the will, and that, two or three days afterwards, the plaintiff told him that he had consulted other lawyers, and that he had made up his mind on the subject; but there was no other evidence that he had in fact consulted them, and it did not appear that he had any proper means of taking advice on the documents in question. The defendants were held not to have satisfied the rule.

So in *Hoghton v. Hoghton (a)*, the Master of the Rolls founded his judgment, in part, on the "grave doubts in his mind, whether the objectionable points of the

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(a) 12 Beav. 229, 239.

settlement in question were ever brought to the attention of the plaintiff."

1867.

Denison  
v.  
Denison.

In *Anderson v. Elsworth* (b), the deed of the plaintiff there in question was drawn by the grantor's own solicitor, upon her own instructions, and yet was set aside because, though the donor "fully understood it with reference to the benefit to be conferred on the donee," she (the donor) was not shewn to have fully understood "the nature and effect of the gift which was made, as it affected her own interests."

In *Gresley v. Mousley* (c), where the impeached transaction was a purchase by a solicitor from his client, the following language is used: "It is, I think, scarcely possible to doubt that the £6940 was not the fair value of the property comprised in this purchase. Supposing, however, this point to be more open to doubt than I consider it to be, what a case do these facts present as to the duty of *Mousley*? Was it not his duty to have obtained the very best advice on the part of Sir *Roger Gresley* as to the value of this property before he himself became the purchaser of it? Ought he not, at least to have inquired of *Court Granville*, and of the owners and occupiers of the property adjoining the *Gresley Hall* estate, what they would have given for these mines? Ought he not to have told Sir *Roger Gresley* of the information he had from *Nadin*? Would he not have been bound to obtain this advice, to make these inquiries, and to give this information, if any other person than himself had been the purchaser? But no evidence is given that any such advice was sought or taken, any such inquiries made, or any such information given. The defendants, the appellants, relied much on Sir *Roger Gresley*'s knowledge of the property. \* \* As

Judgment.

(a) 15 Beav. 310.

(b) 3 Giff. 170.

(c) 4 DeG. & J. 96.

1867. to Sir *Roger*'s knowledge of the property, the question is not what Sir *Roger* knew, but what *Mousley* was bound to have advised. However great a client's knowledge may be as to the value of the property which he is about to sell, he must require advice as to the steps to be taken, and the inquiries to be made, with reference to the sale; and it is one of the most important duties of his solicitor to advise him on those points. The defendants also rely, as to the value of the property, upon the improved access to it which has been opened since the sale, and upon some faults which exist or are supposed to exist in the mines; but it appears from the plan before us, that these faults, supposing them to exist, would not affect the eighty acres, and it is by no means clear, upon the evidence, that they would in any material degree affect the value of the rest of the mines; and at all events inquiry ought to have been made to what extent, if any, they were likely to do so, and Sir *Roger* should have been advised upon it."

Judgment.

In *Grosvenor v. Sheratt* (a), the plaintiff had been induced to make a lease of some of her property under circumstances that cast on the defendants the onus of the proof as to the information which the plaintiff had had. The defendants had given for the property, as the Master of the Rolls considered "what they thought would be fair as between herself (the plaintiff) and the lessees, and such as they supposed any person desirous to take the property would give;" and fourteen or sixteen gentlemen swore that the terms were fair; and were the usual terms, and such as property of that description would be let for in the neighbourhood. Two persons, however, swore that they would have given more, and that the mines were worth more. Previously to the lease in question some applications had been made for a lease by other persons, but the defendants did not ask them what they

would give, and did not ascertain what they cou'd obtain from them. And the learned Judge observed : "In these cases the persons who take a grant, whether it be by a gift, or a sale, or a lease of the property, put themselves in a position, which, in a Court of Equity, makes it almost impossible for them to succeed. They must shew that the grantor had the fullest information on the subject, that he had separate, independent, and disinterested advice, and that, knowing all that he could know, and having the fullest information and this advice, he deliberately and intentionally made the grant. Here the plaintiff did not know that any offers to take a lease had been made by any other persons or neighbouring miners. She did not know what these persons were willing to give; she was not informed of the effect which the reversionary lease of the property, to which she was entitled on the death of her mother, would have in preventing her uniting with her mother to make the mines under it immediately productive, in a manner beneficial to both, if such an occasion should occur," &c.

1867.  
Denison  
v.  
Denison.

Judgment.

*Sharp v. Leach* (a) was another case in which was thrown on the defendant, "the burthen," as the Master of the Rolls expressed it, "of proving the validity of the deed, that is to say, that it emanated from the pure uninfluenced will of the plaintiff, after having both the extent and effect of it fully explained to her; I say the effect of the deed, because, on an examination of these, it appears to me that a more improvident deed, so far as the plaintiff is concerned, it was difficult to frame. \* \* This burthen he (the defendant) is very far from discharging. The ordinary omissions most strongly remarked upon by the Court in such cases, all exist here. She had no independent advice, she had no solicitor, no one explained the deed to her, no one told

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(a) 31 B. 491.

1867. her that it would leave her just as much at the mercy of a future husband as she was before, no one told her that the only effect of it was to reduce her fortune to a life income, no one told her that it would in a great measure cripple her control over the funds in which she might invest her property, no one told her that the deed could not be revoked, no one told her that exactly the same thing could have been done, and yet reserve to her power to leave the property by will as she thought fit, if she should change her mind on that subject."

Denison  
v.  
Denison.

Judgment.

In *Prideaux v. Lonsdale* (a), a young lady entitled to a legacy of stock, executed, by the advice of the executors, a settlement of it, vesting it in herself and two trustees, in trust for herself for life; and after her death, on such trusts as she should by deed or will appoint; and, in default of appointment, for the persons who would have been entitled to it if she had died intestate and unmarried, with a proviso that the trustees, on her request in writing, should join with her in disposing of all or any part of the fund as she might direct. She married shortly afterwards; and after her death the settlement was set aside at the suit of the husband. The executors had no interest of any kind in recommending this settlement, and did so with a good motive; but it was held on appeal, affirming the decree of Vice-Chancellor *Stuart*, that it was such a settlement as "it was not reasonable or prudent for her to execute, and against which she ought to have been advised and cautioned;" and because she was not so advised and cautioned, the plaintiff obtained a decree.

In *Rhodes v. Bate* (b), the onus of giving the like evidence was again on the defendant. Lord Justice *Turner* was of opinion "that the plaintiff signed the bill of exchange, promissory notes, and memoranda, and

(a) 1 DeG. J. & Sm. 439.

(b) Law Rep. 1 Chan. App. 256.

1867.

Denison  
v.  
Denison.

executed the bonds and deeds in question, freely and voluntarily, and without pressure or solicitation on the part of the defendant [*Bate*, to whom the plaintiff had become surety for the other defendant *Codington*]; that their contents were fully explained to her; and that she perfectly understood them, and their nature, purport, and effect, and the consequences of her signing and executing them." \* \* But his Lordship added: "I take it to be a well established principle of this Court, that persons, standing in a confidential relation towards others, can not entitle themselves to hold benefits which those others may have conferred upon them, unless they can shew to the satisfaction of the Court that the persons by whom the benefits have been conferred had competent and independent advice in conferring them. This, in my opinion, is a settled general principle of the Court, and I do not think that either the age or capacity of the person conferring the benefit, or the nature of the benefit conferred, affects this principle." Referring to the extent of the security, and the certainty or extreme probability that the plaintiff would be called on to pay, his Lordship observed: "It is true that he (the defendant *Bate*) told the plaintiff this and cautioned her as to it, but I do not find that he pressed the subject upon her as an independent and disinterested adviser would have done; or that he recommended her to employ an independent solicitor. Under these circumstances, I think that these transactions cannot stand consistently with the general principles of the Court."

Judgment.

The case of *Harrison v. Guest* (a) is relied on in favor of the defendants; but referring to the circumstances of that case, and the explanations of it subsequently given (b), I am of opinion that it has no application to the present case.

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(a) 8 H. L. 481.

(b) See *Clark v. Malpas*, 31 Beav. 85; *Baker v. Monk*, in appeal, 11 Jur. N. S. 692.

1867.

Denison  
v.  
Denison.

These observations dispose of the principal question in the cause—the invalidity of the original transaction; but the defendants rely also on what has taken place since, as a defence to the bill.

It is said, that the plaintiff expected to make a profit by his purchase, and did not file his bill until a negotiation for that purpose with Mr. *Ross* fell through; and that this delay is a bar. We know nothing of that negotiation, if it ever took place, except from some allusions to it by the plaintiff in his conversations with others, as sworn to by them; the defendants' answers say nothing of it; and Mr. *Ross* himself, or any one acquainted with the negotiation, was not called by the defendants. The negotiation took place, if at all, immediately after the purchase, and why or when it came to an end we are not informed; but it is quite certain that the property had not fallen in value between the time of the purchase and the time of filing the bill; and to such a case the doctrine to which this objection refers does not apply.

Judgment.

It is said, also, that the giving of the order of 6th of May, 1863, on the executors, was a confirmation of the purchase, and disentitles the plaintiff to impeach it now. I think that the transaction of 6th May, 1863, is open to the same objections as the purchase itself, and to some others; and is no bar to relief (*a*).

Another point taken on the argument was, that the fact of the final order of foreclosure having been made on the 5th of December, 1864, while this suit was not commenced until the 27th of January, 1865, is a bar to the suit. This defence is not set up by the answers,

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(*a*) See *Mulhallen v. Marum*, 3 D. & War. 317, 334; *Baker v. Bradley*, 7 DeG. McN. & G. 616, 626; *Huguenin v. Baseley*, 14 Ves. 291, 292.

and, indeed, is negatived by them. The defendant *Bacon* by his answer adopts the answer of the defendant *Robert B. Denison*, craves leave to incorporate it as part of his answer, and to avail himself of the several matters of law and fact therein set forth; and *Robert B. Denison*, by his answer, insists that the final order does not bind the plaintiff, and would on application be set aside. That supplies one answer to the defence founded on the final order in the foreclosure suit.

1867.

Denison  
v.  
Denison.

Again, *The Great Luxembourg Railway Co. v. Magnay* (a) was cited in support of this defence. That was a case of a sale and conveyance by the plaintiffs themselves of the property the sale of which to them they were impeaching; and this sale by the plaintiffs was not only after notice of the facts on which their suit rested, but after the suit had been instituted. In the present case, the plaintiff has done no act that deprives *Robert B. Denison* of the equity of redemption. *Robert* was made a party to the foreclosure suit in the Master's office; the plaintiff was not made a party to it; and is not alleged to have ever been applied to by *Robert* or any one else on the subject of the mortgages. If the plaintiff had notice of the suit, there is no evidence that he had been advised or informed of the position or effect of it, or of the necessity of giving it attention; or was aware that his purchase could be set aside. In fact, he was as little in a situation to be bound by that transaction as he was by the purchase itself; and for like reasons (b).

Judgment.

I am also of opinion that the equity of redemption was a mere nominal interest, and not a substantial interest. The property was before foreclosure, viz., on the 4th of June, 1864, offered for sale, and, though there was a large audience, no bid could be got at the

(a) 25 B. 586.

(b) *Maturin v. Fredennick*, 2 New R. 514, 4, *ib.* 15, S. C.

1867. upset price, £1100, which, I presume, was the amount due on the mortgages.

Denison  
v.  
Denison.

Besides, *Robert* must be taken to have known that the purchase by the plaintiff was liable to be set aside, and it was at his own risk that he allowed the final order to go: the wrong was his own. But I have no doubt he has suffered no damage by the suit not having been commenced before the 5th of December, 1864, instead of on the 27th of January, 1865.

For all these and other reasons, I think the final order is no bar to the plaintiff's right to relief.

Judgment. It was also contended, that *Bacon*, as assignee of the judgment on the order of 6th May, 1863, holds it free from any equity the plaintiff might have had against the assignor; but for this contention no authority was cited, and the settled rule is against it. The defence of a purchase for value without notice, does not apply to an assignee of a judgment: an assignee of a debt takes it subject to the equities between the debtor and the creditor. If it is hard that the assignee should be subject to equities of which he may have had no notice when he bought the judgment, it would be hard also that the judgment debtor should be deprived of a just defence by an act of which he had no notice. Parties who take such assignments must be presumed to take them, knowing the rule of law that they take them subject to any equities the debtors may have against the assignors.

I think the plaintiff is entitled to a decree.

*Per Curiam*.—Decree affirmed with costs [MOWAT, V. C., dissenting].

1867.

## DOUPE v. STEWART.

*Partnership—Receiver—Damages for misconduct of co-partner.*

After the dissolution of a partnership, one of the partners claimed the greater portion of the partnership property as his own by reason of certain misconduct he charged against the plaintiff, and made use of the partnership property in carrying on business on his own account:

*Held*, that such proceedings were wrong, and entitled the other partner to a Receiver.

Under the usual directions for taking partnership accounts, it is within the province of the Master to entertain and adjudicate upon a claim by one partner, for damages sustained through misconduct of the other, occasioning the dissolution of the partnership before the expiration of the term agreed upon.

Motion for Receiver and injunction.

Mr. *McLennan*, for the plaintiff.

Mr. *Archibald McLean*, contra.

*Lindley* on partnership, Vol. 2 p. 1020, *Collyer* on partnership, p. 280 (a), *Gold v. Cannan* (b), *Hall v. Hall* (c), were referred to.

MOWAT, V. C.—In or about October, 1866, the plaintiff and defendant agreed to enter into partnership for four years in the business of printers and publishers, the defendant contributing certain plant and printing materials then owned and in use by him, and said to have been valued at \$1950, and the defendant undertaking to put into the business a corresponding sum in cash, payable by instalments. The plaintiff was also to pay the defendant a bonus of \$250, for the privilege of sharing the profits on equal terms. The plaintiff paid this bonus accordingly, and he also duly paid money in respect of the \$1950; but

Judgment.

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(a) 4 Am. from, 2 Ed. (b) 2 Swan. (c) 12 Beav. 414.

1867. whether he paid all that he was bound to pay up to the time of the dissolution of the partnership, there is a conflict in the affidavits. The business was carried on for some months; and it is part of the case of both the plaintiff and the defendant, that, on or about the 12th of February, 1867, the partnership was dissolved, the plaintiff alleging that the dissolution was by mutual consent, and the defendant alleging that the dissolution was not effected by mutual consent, but (as I understand the answer) was the legal consequence of certain alleged misconduct of the plaintiff.

 Doupe  
v.  
Stewart.

Judgment.

Since the dissolution, however it was effected, the defendant, as he states in his answer, has employed "in carrying on a business of his own, the stock, property, and effects which were used in the partnership business," and he claims that by reason of the plaintiff's default such portion of the stock property and effects as was the defendant's own property before the partnership, never became or was partnership property. For this claim there is no ground whatever. Misconduct of a partner does not deprive him of his interest in any property put into the partnership by his co-partner under the partnership agreement, though the misconduct may entitle the latter to a dissolution of the partnership, or to have the loss occasioned by such misconduct made good to him. The plaintiff claims that this using by the defendant of partnership property for a business of his own, entitles the plaintiff to a Receiver; and, *Harding v. Glover (a)*, which is quite in point, is cited in support of this claim. There a motion was made for a Receiver after a dissolution of partnership, and Lord *Eldon* observed: "I have frequently disavowed, as a principle of this Court, that a Receiver is to be appointed, merely on the ground of a dissolution of partnership. There must be some breach of the duty of a partner, or of the contract of

partnership. In this instance the defendants have been carrying on trade on their own account with the partnership effects." The order for a Receiver was therefore made.

1867.

Doupe  
v.  
Stewart.

*Blakeney v. Dufaur* (a) may also be referred to, as it answers several of the objections taken to the motion by the learned counsel for the defendant in the present case, and illustrates the principle on which the Court proceeds in granting a Receiver in partnership suits. The defendant there claimed a right to the exclusive possession of the partnership assets. The parties had carried on business as partners under a deed which provided, that, if either of them did certain acts forbidden by the articles, the other should be at liberty, by notice in writing, to expel the offender from the partnership. The plaintiff alleged that the partnership had been dissolved by mutual consent; while the defendant claimed that it had been put an end to by him for the plaintiff's misconduct, under this provision of the articles. As to the misconduct there was a conflict in the evidence, and, after referring to this conflict and other questions, the Master of the Rolls said: (b) "It is, therefore, in my opinion, the duty of the Court to protect the property in the meantime, for the benefit of those persons to whom the Court, at the hearing of the cause, when it will have before it all the evidence and materials necessary for a determination, shall think it properly belongs. It is said, and on these affidavits I think it appears, that a large balance will be due from the plaintiff to the defendant; and it is alleged by the defendant, that in his belief, if he got in all the outstanding assets, they would not be sufficient to pay all that is due to him. But I have not now the means of taking the accounts; and if I were to refuse to protect the property in the meantime on this allegation, it

Judgment.

(a) 15 Beav. 40.

(b) p. 43.

1867. might happen that, when the cause came on to be heard, it would appear that the defendant had received assets to a much larger amount than he was entitled to, and yet, by reason of having refused this motion, the Court would not be able to give to the plaintiff that portion of the assets to which he was entitled."

Doupe  
v.  
Stewart.

The defendant here was not at liberty to continue the business for his own benefit with what had become, and still was, partnership property; and having claimed partnership property as his own to the exclusion of the plaintiff, and having carried on with it a business of his own, he has been guilty of that sort of wrong which *prima facie* entitles the plaintiff to a Receiver, whatever may be the truth in regard to the misconduct which he charges upon the plaintiff.

Judgment. The defendant alleges that the plaintiff is indebted to the partnership in the sum of \$191, or thereabouts, for printing a book for the plaintiff. The plaintiff says that the agreement was that the money should be paid from time to time, as sales of the book were made, and that the book was not ready for delivery at the time of the dissolution. The learned counsel for the defendant contended, that the plaintiff is not entitled to any relief without first paying this sum; but there is no authority for such a contention (a). The plaintiff will be charged with this debt in taking the partnership accounts, but the payment of it cannot be made a condition precedent to an order for securing the partnership property through the medium of a Receiver, or for taking the partnership accounts.

The delay from the 12th of February to the 4th of September, when the bill was filed, was also relied upon

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(a) And see *Blakeney v. Dufaur*, 15 Beav. 40; *Richardson v. The Bank of England*, 4 M. & C. 165; *Smith v. Crooks*, 3 Gr. 321.

in answer to the application. Part of this time, how much does not, I think, appear, is accounted for by an arbitration between the parties for the settlement of their differences,—which unfortunately proved abortive, the award made being invalid, and the defendant having declined to be bound by it. I think that this objection, like the others, must be overruled, and that the order for a Receiver must go. Each party will have liberty to propose himself as Receiver, without salary, giving security (a). An injunction is unnecessary, and that part of the motion is not granted.

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Doupe  
v.  
Stewart.

It was proposed on behalf of the plaintiff, that the motion should be treated as a motion for decree, and that the usual partnership decree should be made. To this the learned Counsel for the defendant agreed, provided that the claims set up by the answer for losses alleged to have been sustained through the defaults and other misconduct of the plaintiff could be taken into account under such decree, and without specific directions as to such claims; the plaintiff's counsel objecting to the introduction of any specific directions, as unnecessary and embarrassing. I see no reason why the Master may not, under the common decree, consider these claims. If any difficulty would have existed under the old practice, it seems removed by the General Orders (b). The order will therefore direct the partnership effects to be sold, either as a going concern or otherwise, as the Master shall deem proper; the debts to be collected; and an account of the partnership dealings and transactions to be taken. Liberty to apply. Further directions and costs reserved.

Judgment.

This order will perhaps render it unnecessary to get a Receiver appointed.

(a) Kemp v. Jones, 12 Gr. 260.

(b) No. 42, sec. 13, G. O. 3rd June, 1853.

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## BRADLEY V. WILSON.

*Will—Construction of.*

A testator bequeathed certain personal estate to his two sisters *M.* and *S.*, and to their children, all to share alike if living:

*Held*, that the sisters and their children took as tenants in common, sharing *per capita* and not *per stirpes*.

One of the sisters died before the testator:

*Held*, that her share lapsed.

**Statement.** This was a suit by the executors of one *John Bradley*, of the Township of Albion, who died on the 27th of April, 1865. The bill prayed, that the estate of the testator might be administered under the direction of this Court; that the rights of the legatees, and those claiming under or through them, might be determined; and that all proper directions might be given for the guidance and protection of the plaintiffs.

The testator by his will, dated the 4th of April, 1865, gave to his brother *Edward* his real estate (consisting of the west-half of No. 14, in the fifth concession of Albion), and all his farming stock and implements. On this clause of the will no question was raised. The next clause was stated in the bill to be the cause of the suit, and was in the following terms: "Also, I will, devise and bequeath, all my money, notes of hand, and mortgages, to my two sisters, namely, *Mary* and *Sarah*, and to their children, all to share alike if living," His sister *Sarah* had died three years before, but her death was not known to the testator. She left six children, all of whom were still living, and had been made defendants to the bill. She had had two other children who died before the testator. The testator's sister *Mary* was living at the time of the testator's death, but died after the filing of the bill, leaving four children surviving her, all of whom were made defendants. She had had two other children, who died, the bill alleged, "some years ago,"

but whether they died after or before the testator did not appear; each left children; two of the children of one (*Ann Kaar*) were defendants to the bill; but the names and residences of the children of the other (*Henry Bradley*) were said to be unknown to the plaintiffs.

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Bradley  
v.  
Wilson.

Mr. *Blevins*, for the plaintiffs.

Mr. *Ferguson* and Mr. *Edgar*, for the defendants.

MOWAT, V. C.—It is quite clear that the word children does not include grandchildren in such a will as this (*a*). The bill must, therefore, be dismissed against the grandchildren; and as there is no doubt upon the authorities that they cannot claim under the will, the estate cannot be charged with the costs of making them parties to the suit.

Judgment.

A question was then suggested as to whether the testator's sister, *Mary* had a life interest in the particulars bequeathed. But if there is really any doubt on this point, it cannot be formally decided, as no executor or administrator of *Mary* is before the Court. I do not suppose, however, it will be necessary to put the parties to the expense of making a personal representative a party. *Morse v. Morse* (*b*) was cited as shewing that the mother had a life interest. But there the two legacies in question were made payable by instalments; and it was on this ground that the decision proceeded: "It is clear (the Vice-Chancellor said) that the testator did not intend an immediate payment of the two legacies, and there would be an inconsistency with respect to them if the mothers did not take life interests, for then different classes of

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(*a*) Vide 2 Jarmin on Wills, 3rd ed. ch. 30, p. 135, et seq. and the cases there cited.

(*b*) 2 Simons, 485.

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 children would become interested in the two portions of the legacies. I must therefore put such a construction on the bequests as will make all the children participators." If in the simple case of a bequest to the mother and her children, the true construction as the authorities at present stand, is doubtful (a); still, having reference to the terms of this bequest, *Salmon v. Tidmarsh* (b) seems sufficient to shew that the mother did not take a life interest in it. There the testator directed the residue to be equally divided between his wife and children; and the Master of the Rolls held, that the testator thereby determined the proportions, and that the wife took the same share as each of the children. Here the testator directed "all to share alike"—an expression which seems quite as significant as the language so construed by the Master of the Rolls.

*Sarah* having died before the testator, her share  
 Judgment. lapsed (c).

I think the legatees take *per capita*, and not *per stripes*.

These points were stated at the bar as arising on the will. With the exception I have stated they were not argued with any reference to authority. I doubt if they make much, if any, practical difference otherwise to the parties; but it being the desire of all parties that I should express an opinion on the points mentioned, I have done so, under the hope of thereby saving expense. It would not have been proper to make any declaration in the decree, except that the legatees take *per capita*;

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(a) Vide *Crockett v. Crockett*, 2 Ph. 553; *Ward v. Grey*, 26 Beav. 485; *Heron v. Stokes*, 2 Dru. & War. 107; 2 Jarmin on Wills, 373 to 377, 3rd ed., ch. 38, sec. 1,

(b) 5 Jur. N. S. 1381.

(c) *Drakeford v. Drakeford*, 33 Beav. 43; In re *Chaplin*, 32 Law J. Chan. 183, V. C. W.; *Re Gibson's Trusts*, 2 J. and H. 656.

and as on that point the counsel for all parties were agreed, a declaration is unnecessary.

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Wilson.

I have once more to remark that by the present practice it is unnecessary, and therefore improper, in an administration suit, to make all the legatees, or supposed legatees, parties to the suit (*a*); and that, if made parties unnecessarily, the estate is not to be burdened with the costs thereby occasioned. It is said that only two copies of the bill were served, the other defendants having answered without being served. But three answers have been occasioned by it; and two or more sets of costs appear to have been incurred by the defendants, though the sons of *Sarah* and all the children of *Mary* were represented by the same counsel; the daughters of *Sarah* and their husbands being represented by a different counsel, but having no interest adverse to that of the sons of *Sarah*. These matters will be disposed of on further directions. I call attention to them now; Judgment. because the effect of the General Orders on suits of this kind seems often overlooked, to the great increase of the expense of such suits, and the injury of suitors, and, I may add, without any corresponding advantage to the profession.

It was argued for some of the defendants, that the executors should have filed a petition under the late statute, and, not having done so, should now be declared disentitled to their costs of the suit. I do not concur in this view (*b*).

The decree will be the usual administration decree, reserving further directions and costs.

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(*a*) See *Rodgers v. Rodgers* (*ante* page 457), and the cases and orders there cited.

(*b*) See *Re Cæsar's will*, 13 Gr. 310: *Barker v. Piele*, 11 Jur. N. S. 436.

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## AIKINS v. BLAIN.

*Mortgages—Redemption.*

An equitable mortgagee is, after default by the mortgagor, entitled to a Receiver where the mortgagor is in possession, whether the security is scanty or not; and he need not make a prior mortgagee who has the legal estate a party to the suit.

The defendant cannot defeat a motion for a Receiver by a general affidavit that he has a good defence to the suit; he must specify the defence distinctly to enable the plaintiff to meet it, and the Court to judge of it.

This was a foreclosure suit by second mortgagees, on default in paying the interest secured by their mortgage, the principal not being yet due. The mortgage was made by the defendant *Margaret Blain*, wife of the other defendant *George Blain*. The defendants were in possession of the mortgaged premises. The first mortgagee was not a party to the suit, and

Mr. *J. Bain*, for the plaintiff, moved, upon notice, for an order, appointing a receiver of the rents and profits of the estate.

Mr. *Esten*, contra.

MOWAT, V.C.—The plaintiff's motion was for a receiver, and the motion was opposed on several grounds—

Judgment. 1. It was contended that the first mortgagee should be a party to the suit, or his consent obtained to the order asked in his absence. The cases cited in support of this contention (a) shew that the rule was, at an early period, as stated on the part of the defendants; but the practice of the Court is now otherwise, and has been so

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(a) *Phipps v. Bishop of Bath and Wells*, 2 Dick. 608; *Price v. Williams*, Coop. 31.

for more than three quarters of a century (a); but the order is made without prejudice to the rights of the prior mortgagee, so that he may take possession if he chooses (b).

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Blain.

2. It was further contended that the motion could not be made until after answer; but there is no such rule (c).

3. The plaintiffs put their application on the ground of the property being a scanty security for the mortgage debt; and the defendants have gone into evidence to disprove the allegation. The argument turned principally on this part of the case, and a large part of the costs which have been incurred has been occasioned by the controversy as to value. This is much to be regretted, as the plaintiffs' right does not appear to depend in any degree on the scantiness of the security. A mortgagee who has the legal estate is, on default, entitled at law to possession, without any reference to the value of the property; and when he has not the legal estate, he is entitled in equity to the corresponding relief of a Receiver. The defendants can only retain the possession by paying into Court the arrears of interest (interest alone by the terms of the mortgage being yet payable) with costs under the General Order (d).

Judgment.

4. It was further said, that the defendants have a good defence on the ground of failure of the consideration for executing the mortgage, and on other grounds; and there is a general statement to this effect in the affidavit of *George Blain*; but a general statement is insufficient. To resist successfully an applica-

(a) *Bryson v. Cormick*, 1 Cox 422; *Dalmer v. Dashwood*, 2 Cox 378; *Berney v. Sewell*, 1 J. & W. 647; *Tanfield v. Irvine*, 2 Russ. 149.

(b) 2 *Seton's Forms* P. 1026, 1027 4th ed.

(c) *Metcalf v. Pulvertoft*, 1 V. & B. 180, and other cases collected in 2 *Dan. P.* 1570, 1571.

(d) No. 32, sec. 5, June 3rd, 1853.

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Blain.

tion like this, the defence must be distinctly stated, in order that the plaintiff may meet it if he can, and that on the whole evidence the Court may form a judgment as to its validity or probable validity; and the defence, if there is any substantial defence, to this bill is not so stated in the affidavits as to enable the plaintiff to answer it or the Court to judge of it.

Some other objections were urged, which I disposed of during the argument.

The order for a Receiver must be in the usual form (not as in notice of motion), and without prejudice to the rights of the first mortgagee.

### DE HERTEL V. SUPPLE.

*Timber trade—Commission—Interest.*

A merchant agreed to advance money for the purpose of manufacturing timber, to be forwarded to him at Quebec for sale, for which advances he was to be paid certain commissions; having in his discretion held the timber over until the following spring, he claimed interest on his advances until the timber was sold:

*Held*, on appeal from the report of the Master, that he was not entitled to any further allowance than the commissions stipulated for: and the fact that it was shewn that interest under like circumstances had in several instances been charged and paid, was not sufficient to bind any one entering the trade, contrary to the express agreement of the parties.

Statement.

This was a bill for an account of certain dealings between the plaintiff and defendant in respect of advances for the manufacture of timber by the plaintiff. An agreement had been entered into between the parties on the 5th day of November, 1863, in the words following:

“Memorandum of an agreement made and entered 1867.  
 into between *John Supple*, of the Village of Pembroke,  
 in the County of Renfrew, and Province of Canada,  
 lumber merchant, and *John Edward De Hertel*, of the  
 town of Perth, in the County of Lanark, and Province  
 of Canada, lumber merchant.

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“Witnesseth, that the said *John Supple* hath agreed  
 to furnish or supply the said *John Edward De Hertel*,  
 for the purpose of enabling him to manufacture and take  
 to the Quebec market the following lumber, viz., one  
 hundred thousand cubic feet and upwards, of good sound  
 and well manufactured red and white pine timber, the  
 red pine to be of an average of not less than thirty-eight  
 cubic feet, and the white pine of an average of not less  
 than sixty cubic feet per stick, to be made on the  
 Bonchere River.

“The supplies already made, and to be made by said  
*John Supple*, to enable the said *John Edward De Hertel*  
 to manufacture and take to market the aforesaid timber, Statement.  
 to be as follows, viz., six thousand dollars. All which  
 supplies and advances to be made as the getting out and  
 forwarding of the said timber progresses to the satisfac-  
 tion of the said *John Supple*, who reserves to himself  
 the right of curtailing the business, and of lessening the  
 supplies should he at any time deem it necessary so  
 to do.

“The said *John Edward De Hertel* in consideration  
 of the aforesaid advances, doth hereby transfer, make  
 over and deliver to the said *John Supple*, all the red  
 and white pine timber now made, and to be made on the  
 aforesaid Bonchere River, during the present season,  
 and the said *John Edward De Hertel* hereby grants full  
 power and authority to the said *John Supple*, to take,  
 have, and hold the possession of all or any part of the  
 aforesaid timber, and to consider it as his *bona fide*  
 property until full payment be made of the aforesaid  
 advances, and of any other debt due by the said *John*  
*Edward De Hertel* to the said *John Supple*, as well as

1867. for the commission of five per cent on the said sum of six thousand dollars, and any other moneys which said *John Edward De Hertel* shall receive previous to the arrival of the said timber in Quebec. Also, a commission of five per cent on the amount of sale of said timber. And a further commission of two and one half per cent on the amount he shall receive for the payment of the men employed on said timber on its arrival in Quebec. The said *John Edward De Hertel* further agrees and binds himself, on the first opening of navigation the ensuing spring, to transport with the least probable delay all the aforesaid timber to the Quebec market, where the same is to be disposed of to the best advantage. The said *John Edward De Hertel* also agrees to land the said timber at any boom which said *John Supple* shall prefer.”

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Statement. The advances were made as stipulated for and the timber duly forwarded without delay to the defendant, but the defendant, thinking the market too low, held over the timber until the following spring, when in his accounts rendered to the plaintiff he charged interest on the advances, in addition to the commissions; the only intimation by the defendant to the plaintiff of his intention to charge such interest having been given after the close of navigation in a letter dated 10th of December, 1864, in which he wrote: “As you requested, I herewith send your account, which I trust you will find correct. I shall charge interest on this amount until payment is made,” &c.

In taking the accounts between the parties, the Master at Kingston allowed these sums, whereupon the plaintiff appealed.

Mr. *Walkem* and Mr. *Edgar*, for the plaintiff.

Mr. *Crickmore*, contra.

VANKOUGHNET, C.—[After stating the agreement to the effect above set forth.] There is no complaint of want of proper expedition on the part of the plaintiff in getting the timber to market. The delay that arose was after the timber got there, and, by the defendant advising and deciding to hold it over until the following season, in order to get a better price. This decision of his he communicated to the plaintiff, who must be taken to have acquiesced in it, as he did not object. Defendant had the control of the timber, and was interested in getting for it as much as possible towards repayment of his advances. He did not inform the plaintiff that interest on the moneys advanced would be charged while the timber lay in market unsold, but he relies upon a custom, which he says, prevails in the trade, that interest in such a case is charged, and he calls some half dozen witnesses who swear either that they have paid it, or received it under such circumstances. I do not think such a custom established, if there be one. What a few lumbermen may or may not have done among themselves does not establish a custom binding upon every one who enters the trade. It does not appear that the plaintiff here was ever before in the trade, or that he ever knew of interest being so charged, in addition to the commission stipulated for. But the written contract of the parties here must govern, independently of any alleged custom. The reward which defendant was to receive for his advances is there provided for in precise terms.. It would be the greater by just so much time as was saved in procuring a return from the sale of the timber. If the timber could be sold in six months, the defendant would have its produce and his commission so much the earlier in his pocket. If a delay of a year occurred, he would remain just so much the longer out of the use of it. He had the control of the timber and could regulate the time of sale to suit himself. If he delayed it, with the view of getting a larger price for the timber, and thus the better securing repayment of

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v.  
Supple.

Judgment.

1867. his advances, he postponed for so long the commission he had stipulated for ; but, he did not thus gain a right to interest, in addition, for which he had not stipulated.

I think the appeal must be allowed with costs.

### NEWTON V. THE ONTARIO BANK.

*Insolvency—Preference—Boards of trade.*

Sub-sections 1, 2, 3 and 4, of section 8, of the Insolvency Act of 1864, do not prevent a debtor conveying lands to a creditor either in payment of, or a security for, his claim.

A. having manufactured a quantity of goods (a number of oil barrels) for a customer, drew upon him for the price, and applied to a banker to cash the bill, which the banker agreed to do upon receiving a lien on the goods, which was given, and the bill cashed accordingly. On the day following the debtor made an assignment to an official assignee.

*Held*, First, that the transaction was not within either the terms or the spirit of the Insolvent Act.

Second, that if it were within the terms of the Act, the creditor was at liberty to rebut the presumption that the transaction was carried out in contemplation of insolvency.

The provision in the Insolvency Act which authorises Boards of Trade to appoint official assignees, applies as well to unincorporated, as to incorporated Boards of Trade ; and that whether such Boards of Trade were in existence at the time of the passing of the Act or were subsequently created.

This case came on for examination of witnesses before Vice-Chancellor *Syrage*, at the sittings at Guelph.


Argument

Mr. *Crooks*, Q.C., and Mr. *Hodgins*, for the plaintiff.

Mr. *Strong*, Q. C., and Mr. *Blake*, Q. C., for the defendants the *Ontario Bank*.

Mr. *H. W. Peterson*, for the defendant *Hocken*.

SPRAGGE, V.C.—In this case questions are raised as to the proper construction of sub-sections 1, 2, 3, and 4 of section 8 of the Insolvency Act of 1864.

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The first branch of the first sub-section, which deals with voluntary contracts and conveyances, cannot, of course, apply to creditors, but must apply to dealings by the insolvent with strangers. The second branch of the 1st sub-section, and the 3rd sub-section, I think, may properly be read together. The 3rd sub-section, it is agreed by counsel for both parties is, in substance, a re-enactment of the Statute of Elizabeth, which Statute it has been held does not forbid the conveyance of property of an insolvent to one creditor in preference to others. The 3rd sub-section, therefore, it must be held, does not forbid such preference. Then, is there anything in the second branch of the 1st sub-section to call for a different construction? Upon comparing the two, it will be found that there is little, if any substantial difference between them. Each deals with contracts (sub-section 3 adds conveyances), whereby creditors are delayed, made by an insolvent with a person cognizant of his insolvency; the first adds, or having probable cause to believe in his inability to meet his engagements, or after such inability is public and notorious; and declares that such contracts shall be presumed to be made with intent to defraud creditors, The 3rd declares that contracts and conveyances made with such intent (the intent is set out more fully) and so made, done, or intended, with the knowledge of the person contracting, or acting with the debtor, are prohibited, and declared null and void. It is impossible, I think, to hold that the second branch of the 1st sub-section does any more than the first branch of it apply to contracts or conveyances made by a debtor in favour of a creditor whereby such creditor is preferred to other creditors.

Judgment.

Sub-section 2 differs from those I have just commented

1867. upon in this, that it deals with the case of a contract or conveyance made by an insolvent with a person ignorant of his insolvency, and before it has become notorious, but within thirty days before assignment made or attachment issued, and declares the same voidable, "upon such terms as to the protection of such person from actual loss or liability by reason of such contract, as the Court may order." There is no reason for holding this sub-section, any more than sub-sections 1 and 3, to apply to a preference to a creditor. The provision as to the terms upon which the contract or conveyance may be set aside, certainly point rather to a contract or conveyance with a stranger than with a creditor.

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Judgment. Sub-section 4 deals in terms with the "sale, deposit, pledge, or transfer," by the insolvent to a creditor, and a giving, by an insolvent to a creditor, of any goods, effects or valuable security by way of payment, whereby the creditor obtains an "*unjust* preference" over other creditors; such sale, deposit, pledge, transfer or payment is declared null and void, and the subject may be recovered back by the assignee, and if made within thirty days "it shall be presumed to have been made in contemplation of insolvency."

The questions that arise are :—Is the sale, deposit, &c., by way of security, confined to goods, &c., or does it extend to lands? The giving in payment is confined to goods, so there is nothing in this sub-section, to prevent the preferring a creditor, by giving, that is, conveying lands to the creditor in payment of a debt. Has it the effect of preventing his preferring a creditor by giving lands in security, and not prevent his giving them in payment; or does it, in other words, leave him able to convey lands in payment, and disable him from conveying them in security? This would be an anomaly. Does not the whole language of the sub-section point to goods only?

Suppose the parts transposed—if any goods, &c., be given by way of payment, or if any sale, deposit, &c., be made by way of security, such payment, sale, &c., shall be null and void. True, the subject matter, as the section stands, is not expressed in the first clause of it, and the clause is perfect without it. The second branch could not be constructed without expressing the subject matter, and it is expressed and is confined to goods, and then the consequences of both, *i. e.*, of a transfer by way of security, or a transfer by way of payment, are put together under the term “subject thereof.” I think the proper construction of this sub-section is that it applies only to personal estate.

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The result is, that sub-sections 1, 2, and 3, of section 8 do not, in my judgment, forbid the conveyance by an insolvent to a creditor in satisfaction of, or security for his debt, but apply only to dealings by the insolvent with strangers, and that the operation of sub-section 4 of the same section is confined to the personal estate of the debtor. Judgment.

The Ontatio Bank hold the real estate only by way of security—beyond that the plaintiff, as assignee of the insolvent, is, of course, entitled to it.

The question between the assignee and the Bank is, therefore, narrowed to the following personal estate :—The *Buchan* and *Hocken* notes and to what are called the “Refined Oil Barrels.” There is a general charge in paragraph 22 of the bill, of the receipt by the Bank from the insolvent, while in insolvent circumstances, of large sums of money, and that the Bank realized large sums of money out of notes, bills and other securities, transferred to the Bank during such insolvency ; but no evidence is given of this.

As to the *Buchan* and *Hocken* notes, they bear date

1867. 17th November, 1866—one for \$1,022.50 at one year after date—the other for \$1,120, at two years after date, both in favour of *Wm. Hocken*.

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Ontario B'k.

Judgment.

They appear to have been transferred to the Bank on or about the 19th of the same month, by way of collateral security. A note for \$106.60 between the same parties had been discounted at the Bank on the 13th; but it is not shewn that that discount was upon the collateral security of these notes. *Hocken* was at that time in considerable difficulty, and needed forbearance from the Bank, and considerable accommodation, in order to the carrying on of his business, which was extensive and of various kinds. One branch of his business was that of a cooper—a business which he carried on upon a large scale; and he represented, I cannot say untruly, that his difficulty was in a great measure created by a number of his men having left him, whereby he was unable to work up his material, and get his goods to market. He represented his difficulty to be only temporary, stating that he looked for relief from the use of machinery which he was about to introduce, and from the employment of fresh men. At that time, and as late as January, he represented his assets as largely exceeding his liabilities, shewing statements to the Bank Manager to that effect. I am satisfied that when these notes were taken, it was not in contemplation of insolvency, either on the part of the Bank Manager or of *Hocken*; but his account being overdrawn, and there being considerably more accommodation paper than was originally contemplated, the Manager of the Bank required collateral security, and the notes in question were given: *Hocken's* idea then being, as I gather from the evidence, that with the assistance of the Bank, he would be able to work through a difficulty which he believed to be temporary, and continue his business. The Manager of the Bank states in his evidence that it was upon the faith of these notes and the other securities that he allowed

*Hocken* to continue his overdraft, and increased his accommodation discounts. I think the transfer of the *Buchan* and *Hocken* notes is not successfully impeached.

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v.

Ontario B'k.

The transaction of the oil barrels is thus stated in the plaintiff's bill:—"That on the 17th of January, while *Hocken* was insolvent, the Bank induced him to draw a bill of exchange on *Springer & Kinleyside*, of London. Canada, to take up certain overdue discounts, and as a pretence to cover the transaction, induced *Hocken* to give a receipt or bill of lading, of 217 refined oil barrels, shipped or forwarded to *Springer & Kinleyside* by *Hocken*. That the bill of exchange was dishonoured by non-acceptance and the Bank retained the oil barrels." *Hocken* made his assignment in insolvency the following day. The transaction thus stated has an exceedingly suspicious appearance, but it is greatly modified by the evidence. *Hocken* was still carrying on his business. The evidence of the Manager is, "the bill on *Springer & Kinleyside*, was for the price of the barrels. We gave *Hocken* the cash for it." The Manager (the entire truthfulness of whose evidence is not questioned) must mean that *Hocken* having manufactured these barrels for *Springer & Kinleyside*, drew upon them for the price, and that the Bank cashed the bill before acceptance. Taking this evidence with the allegation in the bill, the inference is that the Bank cashed a bill in the ordinary course of business, taking by way of collateral security some paper which gave them control over the barrels. If it were not for the assignment in insolvency following so closely upon the heels of the transaction, there would be no room for any remark upon it. But, being made as it was, the plaintiff contends that it comes within the 4th sub-section, to which I have referred. That it was a deposit or pledge by way of security for payment to a creditor made in contemplation of insolvency, and being within thirty days of the assignment, it is to be presumed to have been made in contemplation of insolvency.

Judgment.

1867.  
 {  
 Newton  
 v.  
 Ontario B'k.

The first question is, whether this is a transaction at all within the clause: what it primarily applies to certainly, is a state of circumstances, materially different—an existing debt and a deposit—or pledge by the debtor to the creditor by way of security for the payment of that debt. Take this transaction by itself, it is not of that character. By itself, it is no more than this—*A*, a manufacturer, having manufactured certain goods for *B*, draws upon *B* for their price, and wanting money, asks a banker to cash the draft. The banker requires a lien upon the goods by way of security, which is given, and cashes the bill; the bill is not accepted, and the manufacturer becomes insolvent. Such a transaction is not within the terms, and, I think, not within the spirit of the Act. In this case there is no pretence for saying it was a device to prevent the barrels falling into the hands of creditors. It appears to have been an ordinary business transaction, and I think not such a deposit

Judgment. or pledge as the Act contemplates.

But, supposing it to be within the terms of the Act, is it to be presumed incontrovertibly that it was in contemplation of insolvency, and if so, is it sufficient if it be in contemplation of the debtor only, or must it be in contemplation of the creditor also? If of the debtor only, and the presumption incontrovertible, it might work very great injustice. It would amount to this, that a person who had advanced his money to a trader or manufacturer in the honest belief of his entire solvency, taking a bill of lading or other security, say four weeks before the trader chose of his own will, or induced by the pressure of others to make an assignment in insolvency, could not show that it was not in contemplation of insolvency. He might be able to show conclusively that insolvency was not contemplated by his debtor, any more than by himself, and still be precluded from doing so if the presumption were incontrovertible.

I think the proper reading of the Act is that the presumption arises without proof under the circumstances stated in the Act, but that the presumption may be rebutted. It is the general rule that a presumption may be rebutted, and I see no reason for making this an exception.

1867.

Newton  
v.  
Ontario B'k.

But then comes another difficulty. On the 18th, the debtor declares himself an insolvent, and makes an assignment to an official assignee. It was only on the previous day that the transaction which is impeached took place; and nothing is shown to have occurred in the meantime to change his business position or prospects. Is it not a most reasonable—almost a necessary—inference that on the 17th he contemplated that insolvency which he declared and acted upon on the 18th. I confess, I think that such would be the proper conclusion. The proposition established in *Baxter & Pritchard* (a), is that insolvency (it was a case of bankruptcy) must be in contemplation of the creditor as well as of the debtor; and, though Baron *Martin* questioned this in *Fraser & Levy* (b), it seems a most just and reasonable proposition. Baron *Martin* treats it of course as a question of construction of the Statute—a construction which might very well be put upon it; but, inasmuch as the act in question could only be done by the joint action of the debtor and creditor, it is not by any means a forced construction that the intent and purpose of the thing contemplated, should be by both.

Judgment.

This provision in the Statute is open also to one or two other considerations. What is the meaning of the words “in contemplation of insolvency?” I take the meaning to be that the sale, deposit, or

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(a) 1 A. & E. 456.

(b) 6 H. and N. 16.

1867. other act, is an act taken in order to save "the subject thereof" from creditors, into whose hands it would otherwise fall. This could not apply to such a transaction as this, for no such purpose could exist where value was paid, unless done with a directly fraudulent intent to favour the debtor and defeat creditors, an intent which could not be pretended here; indeed, the words of the act show to my mind conclusively that such a transaction is not within the Statute; for, the dealing between the debtor and creditor must be one "whereby such creditor obtains or will obtain an unjust preference over the other creditors," evidently contemplating a dealing between a debtor and one of several creditors: whereas the Bank was not in this transaction dealt with by *Hocken* as a creditor, but as a banker advancing money. It was an accident that the Bank was a creditor upon matters entirely unconnected with this particular dealing. It was not a dealing whereby a creditor was secured the payment of his debt in preference to other creditors which the Act prohibits, but a loan upon security which the Act does not prohibit. *Quoad* this transaction the Bank was not a creditor at all, but a banker making an advance in the ordinary course of business, upon negotiable paper, with collateral security.

Judgment.

Something might be said also upon this not being an unjust preference under the circumstances, as I certainly think it could not be. There may be a preference in favour of a creditor which the law will hold not to be an unjust preference, as in the case of *Bills v. Smith (c)*, and the numerous cases therein referred to. But I am so satisfied that the dealing in question is not within the Act, that I think it unnecessary to pursue the subject further.

As to the appointment of the official assignee, by the Guelph Board of Trade, on the 26th Nov. 1866; the question arises, was the Guelph Board of Trade competent to make such an appointment? Was it a Board of Trade within the meaning of the Act, or does the Act confer such authority upon incorporated Boards of Trade only?

1867.  
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 Newton  
 v.  
 Ontario B'k.

It is argued that under the Act only incorporated boards were meant, and that those not incorporated were voluntary associations only—bodies that have no legal entity.

But Boards of Trade unincorporated have been recognized by several Statutes, and under the general term, “Boards of Trade” have been classed with incorporated Boards of Trade; and duties of appointment assigned to them as duties of appointment are assigned by the Act in question.

Judgment.

Before the year 1864, the only incorporated Boards of Trade in Canada were those in Quebec, Montreal, and Toronto; yet, by 4 and 5 Victoria, chapter 89, the duty of appointing Boards of Examiners for inspectors of flour was assigned to the Boards of Trade of Quebec, Montreal, Toronto, and Kingston. By 19 and 20 Victoria, chapter 87, the like duty was assigned to the Boards of Trade of Quebec, Montreal, Toronto, Kingston, and Hamilton; and by 22 Victoria, the like duty was assigned to the Councils of the Boards of Trade of the same cities. By the 18 Victoria, chapter 11, the like duty, but in respect to inspectors of pot and pearl ashes, was assigned to the Boards of Trade of Quebec, Montreal, Toronto, and Kingston.

Further, by 20 Victoria, chapter 32, providing for the constitution of Boards of Arts and Manufactures, and directing the representation in the Boards for Upper and

1867. Lower Canada, respectively of various bodies, it enumerates Universities and Colleges, Boards of Trade, Mechanics' Institutes, and Arts Associations, with the prefix of the word incorporated to the name of each of these bodies, with the exception of Boards of Trade; and there is no room for supposing that this was an omission by mistake; for in subsequent sections providing how Boards of Trade and how Mechanics' Institutes should respectively make such appointments, the same distinction is preserved; and it is preserved also in all points in the Consolidated Statutes. I think the proper conclusion is, that the Legislature, finding such bodies as Boards of Trade in existence, some incorporated and some not incorporated, chose them as parts of the machinery by which certain appointments should be made; in the case of Boards of Examiners for inspectors of flour, and of pot and pearl ashes, designating for that duty some incorporated and some unincorporated bodies by name, but without any distinction; and at a later date they assigned the like duty to all, advisedly, as I think, in the case of appointments to Boards of Arts and Manufactures, and then to appointments of assignees of insolvency.

Newton  
v.  
Ontario B'k.

Judgment.

*The bill will be dismissed with costs.*

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### SHAW V. DRUMMOND.

*Solicitor and client—Mortgage to secure costs.*

In a suit of foreclosure on a mortgage taken by a Solicitor from his client to secure advances and costs, the Court refused to direct a taxation of the costs; there being no over-charges pointed out, or any undue pressure shewn.

It appeared that one *William Fleming*, a settler upon lots four and five, in the third concession of Greenock,

before the issuing of the patent, on the 23rd of March, 1867, made an assignment of his interest in the land to the plaintiff (a solicitor of this Court) to secure certain advances made by the plaintiff to *Fleming* to assist him to make the payments upon the lands in question, and certain costs which were due by *Fleming* to the plaintiff as his solicitor. By an agreement, dated the 23rd of June, 1863, made between the plaintiff and *Fleming*, after reciting the indebtedness of *Fleming*, and that it was desirable to define the position in which the parties stood to one another, it was agreed that the plaintiff should reconvey the land to *Fleming* upon being paid the sum of twelve hundred and fifty dollars, with interest at  $12\frac{1}{2}$  per cent. within six months from the date of the agreement.

Shaw  
v.  
Drummond.

*Fleming* died before the expiration of the six months, and the plaintiff filed his bill against the widow and heirs-at-law of *Fleming*, to foreclose the equity of redemption. By her answer the widow, amongst other grounds of defence, set up at the time the assignment and agreement mentioned were executed, that the plaintiff was *Fleming's* solicitor, and that the advances made by the plaintiff were made during the time such relationship existed.

Statement.

The cause came on for examination of witnesses and hearing at Goderich, before Vice-Chancellor *Spragge*, in October, 1867.

It was found that at the time of the assignment in March, *Fleming* had the advice of another solicitor, but not in June, when the subsequent agreement was made. At the hearing, the counsel for the widow and infants contended that the accounts should be opened; that the agreement of June was not binding upon the parties, and that the plaintiff's costs, which were included in the sum mentioned in the agreement

1867. should be taxed; also that the rate of interest was excessive.

Shaw  
v.  
Drummond.

Mr. *John Bain*, for the plaintiff, cited *In re Thompson* (a).

Mr. *J. F. Toms*, for the widow.

Mr. *W. R. Bain*, for the infants.

Judgment. SPRAGGE, V. C.—The execution of the assignment to the plaintiff, intended to operate by way of security is proved. I have no reason to doubt that its nature was understood both by *Fleming* and his wife; and they had independent advice, though I am not sure that the explanation was so full as it ought to have been. I think the plaintiff is entitled to a decree; and the plaintiff consents to an inquiry whether a sale or foreclosure would be most for the benefit of the infants. My doubt has been whether the mortgage is to be taken as for the amount due on the face of it, or whether this being a dealing between solicitor and client, the solicitor is to be put to prove the consideration. It was given to secure advances and a bill of costs; by much the larger portion, as I have no doubt from the evidence, being for advances. The interest reserved appears very high; but the evidence leads me to believe that no undue pressure was brought to bear upon the client, but that the solicitor was desirous that he should, if possible, obtain a loan elsewhere; and that he lent his assistance to that object, though ineffectually.

The counsel for the infants sends me the following cases: *Walmsley v. Booth* (b), *Drapers' Company v. Davis* (c). I have looked at the cases to which I have

(a) 13 L. J. N. S. 746.

(b) 2 Atk. 27

(c) 2 Atk. 295.

been referred, and at a number of others. *In re Thompson* is a clear authority for the plaintiff's position, that in a case like this, where no over-charges are pointed out, and no pressure is proved, a solicitor taking a mortgage from his client is not subject to have his costs taxed. I think this is the proper conclusion from the elder cases, but *In re Thompson* settles the point.

1867.  
Shaw  
v.  
Drummond.

# VANNATTO V. MITCHELL.

*Practice—Evidence—Executor.*

Where a party to a suit examines a witness at the hearing, the party calling him cannot afterwards exclude his testimony from the consideration of the Court.

In a suit against parties named as executors in a will, seeking to make them responsible as such, notwithstanding their renunciation of the executorship; a legatee under the will is not a competent witness to establish the liability of the defendants.

Three persons were named as executors; after the death of the testator they declined to prove the will, and renounced probate, but expressed their willingness to assist the family with their advice in settling up the affairs of the estate, and accordingly they assisted in preparing a list of debts due by the estate, and of the assets and value thereof; it was also shewn that on being spoken to by a creditor of the estate, one of them stated that they had been named as executors, assured the creditor that he was all right, and that there was enough to pay the debts; another of them subsequently wrote to the widow of the testator, stating that he and the other parties named "were in Port Hope yesterday, and, after taking legal advice on the subject, have relinquished all further action on the will."

*Held*, that these facts did not shew such an acting with the estate as would render the parties liable as executors, in opposition to their renunciation.

Where executors named in a will renounce probate, what acts or dealings will, notwithstanding, render them liable as having assumed the duty of executors considered.

This was a bill by *David Vannatto*, an infant, by his mother, acting as his next friend, against *Roderick*

Statement.

1867. *Mitchell, Joseph Cooper, John Bean*, parties named as executors in the will of *Cornelius Vannatto*, deceased, and one *Noble C. Smith*, a creditor of the testator, to whom letters of administration of the estate of *Cornelius Vannatto* had been granted, on the refusal of the other defendants to prove the will, as stated in the judgment, and praying that *Mitchell, Cooper, and Bean*, might be ordered to make good certain losses alleged to have been sustained by the estate: that *Mitchell* might be declared a trustee, and thus incapacitated from holding certain lands, specified in the bill, purchased by him, at Sheriff's sale, under an execution issued upon a judgment recovered by one *John Poland* against the defendant *Smith*, as administrator; and for an administration of the estate.

Vannatto  
v.  
Mitchell.

The defendants answered the bill, denying any liability as executors, they having refused, from the time of the death of the testator, to prove the will, or accept the responsibility of the executorship.

The cause came on for the examination of witnesses and hearing before Vice-Chancellor *Spragge*, at the sittings of the Court at Cobourg.

Mr. *Strong*, Q. C., for the plaintiff.

Mr. *Blake*, Q. C., for the defendant *Mitchell*.

Mr. *W. Kerr*, for the defendants *Cooper* and *Bean*.

Mr. *Armour*, for the defendant *Smith*.

Judgment. SPRAGGE, V.C.—As the questions raised depend in a great measure upon oral testimony, the first point to be determined is what evidence is admissible, and what not.

One of the defendants, *John Bean*, was called by the

plaintiff, and after he had given his evidence, which turned out to be very unfavourable to the plaintiff's case, the plaintiff desired to withdraw it. I retain the opinion that I expressed at the time, that it is not competent for him to do so.

1867.

Vannatto  
v.  
Mitchell.

Another question is as to the competency of *Robert Vannatto* as a witness: he was called by the plaintiff. I said I thought him not competent, but took his evidence *de bene esse*. A principal object of the bill is to fix the defendants *Mithell*, *Cooper*, and *Bean*, with liability as executors of the will of the late *Cornelius Vannatto*, father of the plaintiff, and of *Robert*. In the will, which names *Mitchell*, *Cooper*, and *Bean*, as executors, there is a bequest to *Robert*, the proposed witness, in an event which has happened, of a pair of horses, or at his option, of £50. It is the interest of *Robert* to fix these parties with liability, in order to his obtaining the bequest; for the assets out of which it might be obtained, are dissipated; and unless it can be gotten from the executors it is morally certain not to be gotten at all; and, in fact, *Robert* says as much in his evidence. Speaking of the institution of this suit he says: "I thought I might get £50 or a span of horses; it was left by the will, and I could not get it any other way than from the executors." It is clear from his evidence that by "executors" he meant *Mitchell*, *Cooper*, and *Bean*. This suit is brought for the immediate benefit of all those beneficially entitled under the will, of whom the plaintiff and *Robert* are two. They have a common interest in fixing the defendants I have named, with liability as executors; and therefore, I think, *Robert* is not a competent witness.

Judgment.

The executors named did not prove the will. The question which lies at the threshold of the plaintiff's case is, whether they acted in the affairs of the estate so as to render themselves liable; and I agree with Mr. *Strong*,

1867. that whatever acts will make a man liable as an executor  
*de son tort*, will be deemed, and taken by the Court as an  
 election by executors named, to act as executors; and  
 that whatever executors named do, in relation to the  
 effects of the testator, which shews an intention on their  
 part to take upon them the executorship, will amount to  
 an acceptance of the office; and I think it may also be  
 stated, that inasmuch as the assets of the testator vest  
 in the executors without probate, any authority that  
 they may exercise in relation to them will be an accept-  
 ance of the executorship. The case of *Cummins v.*  
*Cummins (a)*, before Lord *St. Leonards*, when Lord  
 Chancellor of Ireland, is a strong instance of this. An  
 executor, a survivor of one who had proved the will,  
 gave an authority for the sale of some furniture of the  
 testator. The Lord Chancellor called it a slight act,  
 which did not appear to have been followed up, but held  
 that it must be considered an authority from him to sell  
 the furniture, and he held that to be an election to act,  
 so that he could not afterwards renounce, and sufficient  
 to charge him as executor.

Judgment.

I think this rule may be deduced from the authorities,  
 that in the case of persons named as executors, it is  
 generally a question of intention; but that nevertheless  
 they may commit themselves by acts, contrary to their  
 intention. I have come to the conclusion that in this  
 case it was not the intention of the executors named to  
 accept the executorship. It is rather a nice question,  
 and dependant in a great measure upon the weight  
 to be attached to the evidence of different witnesses,  
 whether they did committ themselves to its acceptance.

The testator died in May, 1862. The will was drawn  
 a short time before by *Bean*, and was executed in his  
 presence, and in that of *Mitchell*. After the funeral,

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(a) 8 Ir. Eq. 723.

and on the same day, it was read over in the presence of the family. Mr. *Bean*, who appeared to me to give his evidence intelligently and fairly, thus relates what passed; and what passed then is very material, for upon that mainly depends whether the defendants accepted or committed themselves to act, or did not. He says: "We had some talk about the debts of the family. The sons made some calculation of the debts and as to the stock, and what it was worth. I think no list or inventory of the personal property was made out. I think I made a note of the debts mentioned in pencil, and of the stock which the sons thought could be spared, I do not recollect what the property was valued at. I do not think I took the memorandum out of the house. \* \* The eldest sons (*i.e.*, *John*, the eldest, and *Robert*), were present at the reading of the will. It was spoken of that the sons were old enough, with their mother, to manage their own affairs. The family seemed to wish us to act according to the will, when *Mitchell* made the above observation, we said we would advise them as neighbours, but did not want to incur any responsibility as executors or trustees. The fact is we were a little afraid to act. What *Mitchell* said was, that the sons were old enough and big enough, to manage the estate with their mother. We all agreed in this, and parted with the family upon the understanding that we would not act under the will, but only give advice as neighbours."

1867.

Vannatto  
v.  
Mitchell.

Judgment.

It would certainly seem strange that *Bean* should refuse to act after preparing a will in which he was named as executor; and in answer to a question from plaintiff's counsel, he said he never intended to act when he drew the will. The testator was then upon his death-bed; and it may be that *Bean*, who with *Mitchell*, was his next neighbour, was unwilling at such a time to thwart his wishes.

The only other evidence we have of what passed at

1867. the reading of the will is that of *Henry J. Meadows*, a son-in-law of the testator. In giving his evidence he appeared tolerably intelligent, but evinced a strong bias for the plaintiff; his own account of himself is not very favourable: "*John* was, like myself, rather wild. He was not a proper person to be left in charge of the estate." He was sent for, as he says, to be present with his wife at the house after the funeral. He says that they found the three executors there, that they said they were executors, and had sent for them in order that they might hear the will read. He says that *Bean* read the will, and that he remained a short time after it was read; he says: "I saw" the executors take the writing desk and look over the papers, they asked for the writing desk; I then left. As I was leaving Mrs. *Vannatto* came and spoke about a heifer for my wife, and asked the executors if they were willing my wife should have it, they also answered that they were willing." I will refer to this matter of the heifer presently. After a good deal of evidence upon other points, he said: "When they met after the funeral one of the executors said, in the presence of the others, that the family were to send any one who had claims against the estate to them to be paid." He says this was while they were looking over the papers. "*Mitchell* told Mrs. *Vannatto* to let the money in the house, nearly £50, go to pay for the *Williams'* land. \* \* There was a large quantity of papers; they found a note in the desk from one *Pentland* which they directed to be handed over to Mr. *Smith*. *Mitchell* said they should stick together and assist one another and they would assist them. They told them to go on and work the place as before." In a previous part of his evidence he said: "Before I left the house I heard the executors tell the family to go on and stick together and help one another, and work the place as they had done." This is all the evidence as to what took place at the reading of the will.

Vannatto  
v.  
Mitchell.

Judgment.

Another circumstance relied upon by the plaintiff is thus stated by the same witness: "On the day of the funeral I heard *Mitchell* tell Mr. *Poland* that he was an executor, and would see him paid, or make it all right, or to that effect. I am quite positive as to that." *Poland* himself relates what passed, thus: "I saw *Mitchell* the day of the funeral. I was a creditor of the deceased. *Mitchell* asked me if I was a creditor, and I said yes. He then said *Cooper*, *Bean*, and I are appointed executors; you are all right, there is enough to pay the debts. \* \* *Meadows* was not present at any conversation with *Mitchell* when he told me that he was executor. I mentioned the conversation in *Meadow's* presence afterwards."

1837.

Vannatto  
v.  
Mitchell.

There are two other occasions upon which it is charged that these defendants acted as executors, and others in which one or other of them acted as such. One occasion upon which all are charged to have acted, was upon the threshing out of some grain which had been sown before the testator's death. It would be tedious to quote all the evidence upon this point. The clear result of it is, that *Mitchell*, *Cooper* and *Bean* did no more than other neighbours did upon the occasion, and that as to *Mitchell* and *Cooper*, it was a mere matter of return of work usual among farmers. The parties sought to be charged neither directed the operations, nor took charge of the grain, but it was locked in the granary, and the key left with the widow in the house.

Judgment.

Another occasion was the sale of farm stock, which took place in the autumn of the year in which the testator died. It was of stock which was not considered by the family absolutely necessary for the purpose of the farm. This sale was not at the instance of the executors, but of the adult sons, and probably of the widow. It was got up and managed by the sons. The

1867. auctioneer says he was instructed by them ; and upon his asking them in whose name the advertisement should be, they decided that it should be in *John's* name.

*Vannatto*  
v.  
*Mitchell.*

The notes (it was a credit sale) were taken in the name of *John*, and upon being signed by purchasers, were given by the auctioneer to *John*, who handed them to his mother. The auctioneer says, that *Mitchell* and *Cooper* were present at the sale, merely as spectators as far as he could see, or knew. They seem to have been careful not even to appear in any other character, for upon the sons speaking to them in regard to articles about to be sold, asking what value should be placed upon them, *Mitchell* said " I (or we) will have nothing to do with it." Other evidence also shews that the sale was conducted by the sons and not by *Mitchell*, *Cooper*, and *Bean*, or by any of them. *Bean* does not appear to have been present at the sale. *Meadows*, too, says, that *John* appeared to manage the sale; that

Judgment. *Robert* was there, and that the widow was in the house. He states, however, a circumstance which does not agree with the evidence of the auctioneer : that he heard *Mitchell* tell *John Vannatto* on the day of the sale to have the notes drawn in his name as it would be more fit, and that they could take them ; and he adds that he saw the notes given by the auctioneer to the widow. I am not sure whether by " his name " the witness meant *Mitchell's* or *John Vannatto's*, but the evidence of the auctioneer is, that he received his instructions for the sale a week or ten days beforehand from *Robert* and *John Vannatto* ; and as to the notes, he says " I printed some notes for the sale in the name of *John Vannatto* ; " adding afterwards, " I am not quite sure that *John's* name was printed in them." Whether it was or not, I confess I do not credit the alleged conversation between *Mitchell* and *John Vannatto* : the witness disagrees with the auctioneer as to the person to whom the notes were handed. He is, to say the least of it, inaccurate in several parts of his evidence : as between him

and the auctioner, Mr. *McNaughton*, I should not hesitate to believe the latter. What he states as having passed between *Mitchell* and *John Vannatto*, is moreover highly improbable, and inconsistent with the utter refusal to have anything to do with the sale spoken of by the auctioner. There is another act of *Mitchell's* resting upon the testimony of *Meadows*, who says, "I heard *Mitchell* speak to *Johnson* about his debt,—some land affair. He told him not to oppress the family, and that he would see him all right. The time and place of this being said, are not given. I have not noted it among the circumstances relied upon for the plaintiff; and standing alone as it does, and resting only on the evidence of *Meadows*, I think no weight should be attached to it.

1867.

Vannatto  
v.  
Mitchell.

Against *Bean* some circumstances are alleged. First, that he retained the will in his possession. That rests upon the evidence of *Robert Vannatto*, which I have held to be inadmissible; *Bean* himself does not say positively that he did not retain it; he says he cannot say whether he had possession of it after the day of the funeral, or what became of it. Judgment.

Another circumstance is, that the notes given at the auction sale were afterwards in his possession. His explanation of this is, that they were given to him by Mrs. *Vannatto* to keep for her, she being apprehensive that her sons might misapply them. Mr. *Poland*, a respectable witness, speaks of these sons *John* and *Robert* as not very temperate, and, as he should think, not proper persons to be left in charge of the estate. Mrs. *Vannatto* refused to receive back these notes from *Bean*.

Lastly, *Bean* is sought to be affected by the contents of a letter addressed by him to Mrs. *Vannatto*. It is dated 8th June, 1861, and is in these terms: "Mr. *Mitchell*, Mr. *Cooper*, and myself were in Port Hope

1867. yesterday, and, after taking legal advice on the subject, have relinquished all further action on the will of Mr. *Vannatto*. If you wish to get the notes that are now in my possession, you can do so by bringing me the receipt I gave you on receiving them; if not, I am instructed to leave them in the hands of Mr. *Whitehead*, Clerk of the Surrogate Court, in Port Hope." It does not appear that this letter was written with the privity of *Mitchell* or *Cooper*. The receipt referred to in it is not produced.

*Vannatto*  
v.  
*Mitchell*.

I have thought it better to review the whole of the facts upon which it is sought to affect these defendants with liability as executors; and the evidence by which they are supported before giving my views as to the character which I think properly belongs to any of them.

As to the two principal witnesses *Bean* and *Meadows*.  
Judgment. The former though called for the plaintiff was a favourable witness for the defendants. His appearance and demeanour were in his favour; and he seemed to be truthful. At the same time I think that, in reading his evidence, it should be remembered that he had a great interest in exonerating himself and those named as his co-executors from responsibility; and that he had written a paper in which he speaks of their relinquishing all further action on the will of the testator, implying according to the ordinary use of language, that they had acted upon the will, an implication that cannot be wholly reconcilable with some of his evidence.

As to the evidence of *Meadows*, I think it is entitled to little if any weight. I have spoken of the manifest bias, with which he gave his evidence, and of the kind of man he described himself to be. Such a man can be but little depended upon, for an accurate and honest statement of facts which passed under his notice; of acts which he saw done: infinitely less can he be

depended upon for an accurate and honest statement of what he heard said: and his evidence consists almost entirely of statements of what he heard said about four years before he gave his evidence. Different Judges have, from time to time, commented upon the unsatisfactory nature of such evidence even from thoroughly honest witnesses. But when a witness evinces a bias which is calculated to warp his testimony, and is moreover an intemperate man, the value of such testimony is reduced almost to nothing. And further, to reduce the value of this man's testimony, he is shewn to be at least inaccurate in his statement as to a conversation between *Mitchell* and *Poland*: the most charitable supposition is, that after a conversation related by *Poland*, he got to believe after the lapse of several years that he was present and heard it himself; and it is impossible to say how much of what he has related as heard by himself, may not be mere hearsay; and this is the more probable from his own statement as to the fact of when he left the house after the reading of the will. He says he remained *a short time* after the will was read—that he saw the executors look over the papers in the writing desk, and then left; I was somewhat surprised after this account of his presence at the house, to hear so much related by him as having passed in his presence.

1867.  
  
*Vannatto*  
 v.  
*Mitchell*.

Judgment.

This case furnishes an illustration of the very unsatisfactory nature of evidence of conversations from recollection. *Robert Vannatto*, as well as *Meadows*, gave evidence of what the executors said as to the payment of creditors of the estate. *Vannatto's* version of it is, that they told the sons to pay any creditors that asked for payment. *Meadow's* version is, that one of the executors (who he afterwards said was *Mitchell*) said that the family were to send creditors to them to be paid, and this he reiterated, leaving no doubt as to his meaning. I do not say which was right, or that either was, but it is certainly a remarkable discrepancy upon

1867. a material point; and these two witnesses differ upon another point, not a material one, *i. e.*, as to the person who made the suggestion as to the heifer. *Meadows* says with some particularity that Mrs. *Vannatto* made the suggestion, while *Robert Vannatto* says that it came from him. I think that *Robert Vannatto's* evidence may be referred to for the purpose for which I use it, *i. e.*, by way of illustration. I should use it for this purpose if it and the evidence of *Meadows* had been evidence given by two witnesses in another cause. My opinion as to the evidence of *Meadows* in relation to what passed on the occasion of the reading of the will is, that it is wholly unreliable; and in truth of no value.

*Vannatto*  
v.  
*Mitchell.*

Judgment.

And now as to the evidence of *Bean*: it is very material. Did the executors announce to the family of the testator that they would advise them as neighbours but would not act as executors; and did they, at the conclusion of the conference, part with the family upon that understanding? I have adverted to *Bean's* obvious interest in the matter, but it is against the tendency of modern opinion and legislation to reject testimony because the witness who gives it has an interest in what he says. In being called for the plaintiff he was put forward as trustworthy; and except in the particulars I have referred to, I see nothing against him. Moreover, he is wholly uncontradicted even by *Meadows*, for *Meadows* left before the conference between the parties terminated; and what *Bean* states upon the point in question is quite as likely to have occurred after he left as before. It was not a point upon which there could be a mistake. Either that took place which *Bean* says did take place, or he has been guilty of a sheer fabrication of falsehood, not of exaggeration, or evasion, or distortion of the truth, but of nothing less than wilful perjury.

Then again the conduct of the executors and of the

family at the threshing of the grain and at the sale, squares with the relative position of the parties being what *Bean* swears it was announced to be; and the conduct of *Bean* himself in going with one of the sons to Mr. *Williams* to speak to him on the subject of the purchase money of the land, was a mere act of kindness. It was a matter with which the executors had nothing to do, but which a neighbour who had promised to assist with his advice, might very well interest himself in. I think I must take the fact to be as *Bean* has sworn it to be.

1867.  
Vannatto  
v.  
Mitchell.

The relative position of the parties then was this: They declined to act as executors, as they had a perfect right to do. They declared their willingness to assist the family with their advice. This, the family were at liberty to accept or reject. They would have preferred that the parties named as executors should have acted as such; but as they, fearing the responsibility, declined to act, the family accepted them in the other capacity. Judgment.

If this was the position established between the parties, we must look at all that was said and done through the medium of that position. If they had not guarded themselves by assuming that position, everything they said or did would be an act of authority—an exercise of control—that would be a direction and a delegation of authority in the one case, which in the other would be a mere piece of advice.

In *Doyle v. Blake (a)*, Lord *Redesdale* put very pointedly the position of parties acting as executors. It was a case in which the parties named as executors had determined to act in only one point. Lord *Redesdale* said “The whole transaction, therefore, is one which demonstrates that these gentlemen having in the

1867. character of executors, a power and influence and control over the assets, used that power and influence and control which that character gave them. \* \* It is manifest that the whole assets were under the control of *Blake* and *Athy* (the executors), and that they did exercise that control to the extent to which, as they state, they conceived themselves in point of honour bound. \* \* They put the assets into the hands of *Horan* and procured him to be appointed administrator. I think, therefore, he is to be considered their agent just as if they had given him a power of attorney." I have quoted the language of Lord *Redesdale* because it is an exposition of the law as favourable to the plaintiff's case as perhaps any that can be found. But, the position of these parties was essentially different. They did not use the power and control which they had, under the will. They did not put the assets into the hands of the family; they left them where they found them; they said they thought their intervention unnecessary; that the family could manage their affairs without them; they repudiated authority and control, and offered only that which they could have offered if they had not been executors.

Judgment.

Upon referring to the various circumstances relied upon as acts of interference with the estate, we find them to be, with the exception of the threshing of the grain and the sale of stock, which I have already commented upon, to consist of words rather than of acts; not but that words may not constitute a dealing with an estate, but the words used here were not of that character. As to the matter of the heifer spoken of by *Meadows*, a heifer was left to Mrs. *Meadows* by the will, and for that reason no doubt was mentioned; this circumstance could only be important if the executors assumed authority in dealing with it. The exact language that they used is all important. I have not the slightest confidence that the language imputed to them

by *Meadows*, was really used by them. As an instance of how unsafe it is to trust to the memory of witnesses for the accuracy of language used years before, I again refer to *Robert Vannatto's* evidence. He not only makes the suggestion come from a different quarter, but puts a different answer into the mouths of the executors, to the effect that *Mrs. Meadows* might have it if the family had no objection; and the two state the circumstance as occurring at a different time.

1867.

Vannatto  
v.  
Mitchell.

It is said that an inventory was made out. It is doubtful whether this is a fact, but it is not material. The making out of an inventory is not an act that would constitute an executor *de son tort*, nor is it an acceptance of the office of executor.

The conversation between *Mitchell* and *Poland* is relied on against the former. But, in the first place, the time is not fixed except that it was on the day of the funeral; but whether before or after the conference with the family, does not appear. Supposing it to be after, as the allusion to the state of the assets may perhaps indicate, it was, even as recollected by *Poland*, only an affirmation of two things: that he, with *Cooper* and *Bean*, had been named in the will as executors, and that *Poland* might feel safe, as there were sufficient assets. I have no doubt that Mr. *Poland* meant to state what passed, but whether he understood correctly and recollected accurately, is another thing. *Mitchell's* purpose, no doubt, was to impress upon a creditor of the estate that he was safe and need not harass the family. If he said that he, with *Cooper* and *Bean*, who had been named as executors, had some knowledge of the assets and thought them sufficient, *Poland* would probably recollect what passed in the terms in which he has stated it.

Judgment.

There seems nothing whatever specially to affect

1867. *Cooper*. As to *Bean* there are the affairs of the notes and the letter. I have already referred to them. The evidence leads me to think that about the time of the sale there was a desire on the part of the family, or some of them, to entrap these defendants into some act that would amount to an interference with the estate. The grain which had been threshed, a valuable part of the personal estate, having been dissipated or used, and debts pressing upon the estate, the question put to *Mitchell*, or to *Mitchell* and *Cooper* at the sale, and *Mitchell's* answer, have that appearance; and the refusal of the widow to receive back these notes, looks like another instance. I have no reason to think that *Bean's* explanation about the notes is not the true one, that the widow was or affected to be apprehensive of her sons getting hold of the notes and misapplying them, and placed them in the hands of *Bean* to keep for her.

*Judgment.* As to the letter. The mischief of it consists in this, that it uses the words "have relinquished all further action on the will of Mr. *Vannatto*." In strict grammatical construction, apart from the knowledge of previous circumstances, it implies a former action which was thenceforth to cease. At most it is an implied admission that he had acted, and an implied assertion that *Mitchell* and *Cooper* had acted with him. This was after taking legal advice, as he says, upon the subject. If so construed, it amounts to this: *Mitchell*, *Cooper*, and myself, have taken legal advice upon the subject of the executorship, and, having acted, we are advised not to act any further. It is scarcely possible that such advice could have been given, if the implied admission is to be read as contended for; for it is implied that they had acquainted their legal adviser with the fact of their having acted, as well as implied that they they had in fact acted, and *Cooper* as well as *Mitchell*, and the writer are placed in the same category. *Cooper*, so far as appears (and the plaintiff's

friends seem to have sought diligently for instances), never having in the slightest degree by act or word interfered in the affairs of the estate after the day of the funeral.

1867.

~~~~~  
Vannatto  
v.  
Mitchell.

I think it would be going too far to hold *Bean* liable to account upon this implied admission. An admission does not conclude the party making it from shewing the truth; and I think upon the whole of the evidence the truth is, that neither *Bean*, nor *Mitchell*, nor *Cooper*, ever accepted the executorship; or interfered in the affairs of the estate so as to commit themselves to act as executors, or to make them liable to account. I think, however, that the letter of *Bean* might well lead the plaintiffs into the belief that he had acted, and that for that reason he should be refused his costs.

The case made against *Mitchell*, as a trustee, falls of course with that made against him as executor, and there is nothing else to impeach his purchase. The bill as against him and *Cooper* must be dismissed, and with costs. Judgment.

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### SHEPHERD V. HAYBALL.

*Practice—Quieting titles—Payment of costs of former proceedings.*

In prosecuting a claim to land before the referee of titles, a contestant, served with notice, will not be prevented from asserting his rights until payment of costs of proceedings instituted by him against the claimant, in respect of the property in question, ordered to be paid by the contestant.

In prosecuting this claim before the referee of titles, it appeared that the contestant *Edwin Hayball*, had brought an action against the claimant, in which he was defeated, because he had been unable to establish a will;

1867. that he then filed a bill in this Court against the claimant, for discovery of the will in aid of his action, which bill was dismissed with costs. The claimant afterwards presented a petition to have his title quieted under the Act. The contestant filed a counter claim, setting up the same title as he had done at law, and in the bill in this Court. The claimant was unable to realize either the costs of the action or of the suit in this Court out of the contestant, and he applied to the referee, under the 22nd sec. of chapter 25 of 29 Victoria, for an order for payment of these costs, before the contestant should be allowed to proceed. The referee made the order, and the contestant appealed from the order.

Shepherd  
v.  
Hayball.

Mr. *J. Bain*, for the contestant.

Mr. *A. Hoskin*, for the claimant.

Judgment. SPRAGGE, V. C.—My opinion is that the order appealed from is wrong in principle. The petitioner is the party prosecuting the proceedings. The adverse claimant is substantially a defendant. He is brought into Court by the petitioner, and he opposes the petitioner's case by setting up a title in himself. It is the only way that he can oppose the petition. It is an anomaly to say that he cannot do this except upon payment of costs of other proceedings. If he were prosecuting a claim himself it would be different. There would be the analogy of a plaintiff in a suit, but it does not apply to the case of a contestant of the petitioner's claim. It is reasonable to say you shall not prosecute without paying costs of former proceedings; it is not reasonable to say you shall not defend without paying such costs. I have looked at the Statute, and find that there is nothing in it to affect the question as I have stated it. The appeal, therefore, is allowed. The costs of the appeal to be set off against costs due by the appellant on the former proceedings.

1867.

## ROSS v. FOX.

*Mineral lands—License to dig—Personal right—Incorporeal freehold—  
Personal skill, &c.—Volunteer.*

The owner of lands, supposed to contain certain valuable ores, executed to two persons an instrument in writing, (intended to be under seal, but by mistake not sealed,) to dig for minerals on the land, they agreeing to give to the owner of the soil one-twentieth part of all the minerals they might find or take from the property.

*Held* (first), that the interest intended to be conveyed was an incorporeal freehold or tenement, and could only be created by an instrument under seal: (second) that if it was intended to operate as a *license only*, it would be revocable, and the Court would not make a decree to establish a right or interest which might be immediately revoked.

The holders of a license to dig for ore made a voluntary transfer of their right to another, and subsequently the licensor duly conveyed, for value, a like privilege to others, who also purchased from the original licensees their interest, and entered upon and worked the lands. Nearly three years afterwards, the assignee of the first license filed a bill seeking to enforce an exclusive right to dig. The Court, under the circumstances, dismissed the bill with costs.

A party to whom a license to dig for ore (the grantor being entitled to a royalty of one-twentieth part of the ore,) was granted, was described in the instrument as a miner, and he subsequently transferred his right to another, without authority from the owner of the soil. *Held*, that the case came within that class in which the personal skill, knowledge, or other personal quality of the grantee, is a material ingredient in the contract, and therefore the right could not be assigned.

The Court will not, in favour of a volunteer, order the due execution of an instrument informally executed, although the relief would be granted in favour of a purchaser for value.

This cause came on for the examination of witnesses Statement. and hearing at the sittings of the Court, at Cobourg.

Mr. *Strong*, Q. C., and Mr. *Fitzgerald*, for the plaintiff.

Mr. *Blake*, Q. C., and Mr. *Moss*, for the defendants.

1867.

Ross  
v.  
Fox.

*Wood v. Leadbitter (a), Seaman v. Vawdrey (b), Cheatham v. Williamson (c), Doe dem. Hanley v. Wood (d), Norway v. Rowe (e), Winter v. Brockwell (f), Wallis v. Harrison (g), Liggins v. Inge (h), Patching v. Dubbins (i).*

Judgment.

SPRAGGE, V. C.—The plaintiff's case is, that he is entitled to a one-third interest in a right to dig for and take away minerals on the west-half of lot 18, in the 5th concession of the Township of Madoc. The plaintiff bases his claim upon a written instrument in which he claims to be interested, entered into between *George Fox* the owner of the land, who is made a defendant, and two other defendants *Snider* and *Rupert*. This agreement has no date, but appears to have been entered into in the beginning of August, 1864, and is in the following terms:—"That the said *George Fox* of the first part doth give unto the aforesaid *Snider* and *Rupert* of the second part full power and privilege to dig up, tear up, or in any way to get up and take away any mine mineral, that they may find upon the west-half of lot No. 18, in the 5th concession of the Township of Madoc. And this agreement further shews that the aforesaid parties of the second part doth agree to give unto the said *George Fox* of the first, the one-twentieth part of all they may find or take away from the aforesaid lot of land." In the attesting clause the instrument is expressed to be "signed, sealed, and delivered, in presence of" the subscribing witness *O. B. Johnson*, by whom the paper was drawn. It was signed by the three parties, but no seals were affixed. *Johnson* says that he was instructed to seal the paper, and said that he would do so; that he intended to seal it, but it was neglected.

(a) 13 M. &amp; W. 838.

(c) 4 East 469.

(e) 19 Ves. 158.

(g) 4 M. &amp; W. 538.

(b) 16 Ves. 392.

(d) 2 B. &amp; Al. 724.

(f) 8 East 308.

(h) 7 Bing. 682.

(i) 1 Kay 1.

The interest that this instrument purported to convey was an incorporeal freehold or tenement, and I think it clear upon the authorities that such an interest in land cannot be effectually created by an instrument not under seal. It will be sufficient to refer upon this point to *Hewlins v. Shipham* (a), and *Wood v. Leadbitter* (b). In the latter case, Mr. Baron *Alderson*, by whom the judgment of the Court was delivered, expressed himself thus: "That no incorporeal inheritance affecting land can either be created or transferred otherwise than by deed is a proposition so well established, that it would be mere pedantry to cite authorities in its support—all such inheritances are said emphatically to lie in *grant*, and not in livery, and to pass by mere delivering of the *deed*. In all the authorities and text-books on the subject, a deed is always stated or assumed to be indispensably requisite. And although the older authorities speak of incorporeal *inheritances*, yet there is no doubt but that the principle does not depend on the quality of interest granted or transferred, but on the nature of the subject matter; a right of common, for instance, which is a profit *a prendre*; or right of way, which is an easement, or right in nature of an easement, can no more be granted or conveyed for life or for years, than a fee simple."

1867.

Ross  
v.  
Fox.

Judgment.

It is argued that the instrument may be good as a license, though not good as a grant. That argument, however, involves this dilemma: If it is a mere license it is revocable, and the Court will not make a decree to establish a right or interest which may be revoked the next day. To make it irrevocable, it must be more than a mere license, it must be such an instrument as will be effectual to convey an incorporeal interest in land, whether it be called a license, as it sometimes is, or a grant. The point is thus put in *Wood v. Leadbitter*:—(c),

(a) 5 B. & C., 221.

(b) 13 M. & W., 838.

(c) At page 845.

1867. “Where there is a license by parol, coupled with a parol grant or pretended grant of something which is incapable of being granted otherwise than by deed, there the license is a mere license, it is not an incident to a valid grant, and it is therefore revocable. \* \* Suppose the case of a parol license to come on my lands, and there to make a water-course to flow on the land of the licensee. In such a case there is no valid grant of the water-course, and the license remains a mere license, and therefore capable of being revoked.” If this were not so, it would be giving a different effect to the instrument, according to the name it might be called by.

ROSS  
v.  
FOX.

It is then contended for the plaintiff, that supposing this instrument not effectual to confer the right which it purports to convey, the Court should exercise its jurisdiction to aid the defective execution of the instrument, so as to effectuate the intention of the parties. I will pre-  
 Judgment. mise, that the application of this jurisdiction is in my judgment a matter of judicial discretion, to be exercised or not, according as it may conduce to the ends of justice in each case, in which the jurisdiction is invoked. It is a familiar rule that it is not to be exercised in favour of a volunteer; the jurisdiction in that case standing upon the same footing as the jurisdiction in cases of specific performance. The two heads of jurisdiction appear to be founded substantially upon the same principle, with this difference, that in the one the parties apprehend that they *have* done validly and effectually what they intended to do, and that they have perfected their agreement: in the other, they are aware that the matter rests in contract, but this does not seem to me to be a difference in principle. In each, the interposition of the Court proceeds upon this, that the relation of trustee and *cestui que trust* does in the view of a Court of Equity subsist between them; and that it is the office of a Court of Equity to give effect to that relation in all proper cases.

We know in how many instances the Court refuses its aid in cases of specific performance; and no instance occurs to me, though I am not prepared to say that none exist, in which it would be proper to refuse specific performance, and yet aid a defective execution, that is to say, where the circumstances are the same, with the one point of difference, that in the one case there was a known and admitted contract only (that is, as a general rule,) and in the other what the law can hold to be no more than a contract, though the parties imagined and intended more. It is not necessary, however, to go further than this: that the Court will only grant its aid in either case in furtherance of justice; and this must follow from the exercise of the jurisdiction, being a matter of judicial discretion, and not *ex debito justitiæ*, for it would not be a sound exercise of discretion to interpose where the interests of justice would not thereby be promoted. It lies therefore upon the plaintiff to show this in his case.

1867.

Ross  
v.  
Fox.

Judgment.

In this view, the position and rights of the parties become material. What they would have been if the instrument to which I have referred had been valid and effectual, and what they will be if it be made valid and effectual by the decree of this Court.

I see nothing in the instrument upon which the plaintiff bases his right to confer upon *Snider* and *Rupert* an *exclusive* right to work for minerals, there is nothing in it to prevent *Fox* himself from working the land for the same purpose, or granting the right to do so to others. *Chetham v. Williamson* (a) and cases cited therein, and, therefore, the subsequent conveyance by *Fox* was not a derogation from his grant or supposed grant to *Snider* and *Rupert*; and if *Chard* and *Wellington*, or others claiming under *Fox*, had worked for minerals in any other part of the west-half of lot 18 than that which was

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(a) 4 East, 469.

1867. opened by *Snider* and *Rupert*, they, and consequently the plaintiff, would have had no ground of complaint. Upon any other construction, indeed, the agreement would be an unreasonable and hard one upon *Fox*. The right purported to be conveyed was probably for the life of *Snider* and *Rupert*. There was no covenant on their part to work the land for minerals; and no consideration or equivalent to *Fox* for his land being subjected to the right to work it for minerals, unless the royalty of twenty per cent. upon the ore that might be gotten out by them; so that if an exclusive right were conferred, it would be a bargain so hard and unequal that the Court would, I apprehend, hardly lend its aid to carry it out.

ROSS  
v.  
FOX.

Judgment. But I think the right purported to be conveyed to *Snider* and *Rupert* was not an exclusive right; and this narrows the question to what was and is the position, and what the rights of the parties in relation to the mine or opening made by *Snider* and *Rupert*; and it must lie upon the plaintiff to shew to the Court that upon all the dealings of the parties, and under all the circumstances of the case, his right to this mine is a better right in equity than the right of the defendants.

I do not think that upon the evidence the acquisition by the plaintiff of an interest in the mining right in question can be placed at an earlier date than the 30th of August, 1864, somewhat less than a month after the execution of the instrument between *Fox* and *Snider* and *Rupert*. *Snider* and *Rupert* transferred their rights to *Chard* and *Wellington*, within a few days afterwards. There is nothing in the instrument of the 30th of August, to give it a retroactive operation; but nevertheless any acts by *Snider* and *Rupert*, and any dealings between them and *Fox* which would strengthen their title, though occurring before their assignment to *Ross*, would enure to his benefit. By the assignment, he became a sharer in their rights, whatever they were, with the

liability, however, to have the right he had so acquired cut out by a subsequent purchase for valuable consideration, unless he was himself a purchaser for value. As to this, there is a distinction between *Snider* and *Rupert*. There is evidence of advances to *Snider*, though not evidence of a very satisfactory nature; still, as upon the transfer of the 30th of August, *Snider* admitted these advances, as a consideration for the transfer on his part, it cannot now be contended that the transfer on his part was without valuable consideration. As to *Rupert*, there is no evidence whatever of his receiving any valuable consideration for his transfer. The consideration expressed—five dollars—was merely nominal. The proper conclusion from the evidence, that of Mr. *Ponton*, is, that no money consideration was paid, and *Chard* and *Wellington* being subsequent purchasers for value, their purchase overrode the purchase by the plaintiff from *Rupert*.

1867.

Ross  
v.  
Fox.

What was then and afterwards the position of the parties. Judgment. The plaintiff's allegation is that he "has been up to the present time, and still is, in the full possession and enjoyment of his rights under the said agreement, and has continued up to the present time to work the said mine to the extent of his share, and to take the minerals upon the said land, and, in so doing, has made a considerable expenditure of money." The evidence shews, on the contrary, that all the work at the mine, since the transfer to the plaintiff, has been done by the parties claiming adversely—*Chard* and *Wellington*. The work, indeed, was not very great. It was the work of two, and then of four men, for some three or four months, commenced shortly after the acquisition of the title by *Chard* and *Wellington*. The possession, so far as there has been possession, and the work have been that of *Chard* and *Wellington*; and there is no evidence of any assertion of title, even, by the plaintiff from that time, till shortly before the filing of the bill. All that is shewn by the plaintiff is advances to *Snider*, to the extent of a few dollars, and

1867. the evidence is conflicting as to whether any of them were on account of the mine in question. Then, when adverse claims were made and acted upon by other purchasers, there was no assertion of right on his part ; these other purchasers paid a substantial valuable consideration, first, to *Fox*, the owner of the land, then to *Rupert* and *Snider* for their interest, and expended a considerable sum, probably some three or four hundred dollars, in working the mine, without even a remonstrance, so far as appears by the plaintiff. The bill was not filed till the 13th of March, 1867. I think that, giving due weight to these considerations, I must hold the plaintiff not now entitled to the relief he asks. The delay is, probably, sufficient of itself to disentitle him.

ROSS  
v.  
FOX.

Judgment.

There may be other difficulties also in the way of the plaintiff's succeeding. I have some doubt whether *Snider* and *Rupert* could be regarded in any other light than as volunteers. The right purported to be conferred is, to dig for minerals, paying to the owner of the soil a royalty of one-twentieth part thereof. They pay nothing for this privilege—no consideration emanates from them—they have the right, which they may exercise or not, at pleasure, they are not bound to spend a shilling. It cannot be said that the royalty is the consideration, because the royalty is only an incident to the exercise of the right, for which right they pay nothing.

I confess, however, that I do not see any substantial distinction between an agreement of this nature and an agreement for a lease ; and there is also the question of part performance and expenditure of labour and money. I am not prepared to say that relief could be refused upon this ground.

There is, however, this further difficulty. There is nothing in the terms of the agreement to show that it was intended to be transferrable. One of the parties,

1867.

Ross  
v.  
Fox.

*Snider*, is described as a miner ; and the right to dig for minerals is conferred upon the parties by name, without more. The question is, whether it was not a *personal* right—one test would be, suppose it had been to *Snider* alone ; and that *Snider* was, in fact, agent for the plaintiff, without disclosing his principal, could the plaintiff claim the benefit of the agreement. It is obvious that in an agreement of this nature a great deal must depend upon the skill, industry, perseverance and means of the person who is to work the mine. In the hands of one worker, it might be profitable and satisfactory to the owner of the soil ; in the hands of another, quite the reverse ; and so it might be detrimental to him, and therefore, unjust, to force upon him, as a worker for minerals upon his land, a different person than the one with whom he had made his agreement. The law upon this point is well settled ; it is clear that where the skill, knowledge, solvency, or other personal quality of a party with whom an agreement is made is a material ingredient in the contract, or, as put by Baron *Alderson*, in *Rayner v. Grote*, (a) may reasonably be considered as a material ingredient, there the contract can be performed by him alone ; no assignee can claim the benefit of it. I incline to think that the case before me falls within this rule.

Judgment.

The bill must be dismissed as against all the defendants with costs.

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(a) 15 M. and W. 365.

1867.

## ADDAMAN V. STOUT.

*Specific performance—Costs—Personal representatives—Parties.*

A purchaser of real estate paid a portion of the purchase-money during the life-time of the vendor, and after his decease paid the balance to his personal representatives; none of the heirs-at-law were infants, but they refused to execute a conveyance to the purchaser who filed a bill against the real and personal representatives for specific performance. The conduct of the personal representatives was shewn to have been correct, and the Court, in making the decree asked, ordered the plaintiff to pay the personal representatives their costs; but gave the plaintiff his costs of suit against the heirs-at-law; not against the estate of the vendor.

Where it is clear that a purchaser of real estate has paid all his purchase-money, whether it is necessary, in a suit for specific performance against the heirs-at-law of the vendor, to make the personal representatives parties to the bill therefor. *Quære.*

In such a case it would seem sufficient to add the personal representatives as parties in the Master's office.

Examination of witnesses and hearing at Chatham.

Mr. Roaf, Q. C., for the plaintiff.

Mr. Blake, for the defendants *Butler* and wife.

The bill was *pro confesso* against the other defendants.

*Weihe v. Ferrie (a), Hoddell v. Pugh (b).*

**Judgment.** SPRAGGE, V. C.—This is a bill for specific performance. It is filed by the purchaser of real estate against the heirs-at-law, and the personal representatives of the vendor, who died intestate. A portion of the purchase money was paid to the vendor, and the balance has been paid to his personal representatives. None of the defendants are infants.

The bill alleges that the plaintiff requested the defendants, the heirs-at-law, to convey to him, and tendered to them a proper conveyance; but that they refused to execute the same, or to convey the legal estate to the plaintiff. The bill is taken *pro confesso* against the heirs-at-law.

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The personal representatives of the vendor have put in an answer. They do not dispute the plaintiff's right to a conveyance; and they say that they have been willing and anxious that he should have the same, and that, in ignorance that they had no power to do so, they did, at his request, execute to him a quit-claim of the lands sold to him by the intestate.

There is no dispute that the plaintiff is entitled to a conveyance. The only question is one of costs. The plaintiff asks for costs against the heirs-at-law; and adds, "or that the said costs ought to be paid out of the personal estate" of the vendor, which, or a great part of which, it is alleged is still in the hands of the personal representatives, and the plaintiff asks for an administration of the estate for that purpose. The plaintiff is entitled to his costs against the heirs-at-law. The question is, whether he is entitled to his costs against the estate of the vendor. Judgment.

It is now settled that when a vendor dies intestate leaving infant heirs, the plaintiff is not entitled to his costs, because the necessity for the suit was occasioned by the act of God. Mr. *Roaf* concedes this, but takes this distinction, that in the case of infant heirs there is no wrong on their part; whereas, when the heirs are adult and refuse to execute a conveyance, they are wrongdoers; and that their wrongful refusal is a contingency provided for by the bond of the vendor, which stipulates that the vendor, his heirs, &c., shall make a conveyance upon payment of the purchase money.

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But what I fail to see is a distinction in favour of the purchaser when the heirs are adult. It is settled that if they are infants he gets no costs, because the suit has become necessary by the act of God. He is therefore excused, or his estate is, for the non-fulfilment of his stipulation. His death, not his wrong or default, made the suit necessary, and his estate is not made answerable, though a suit became an inevitable necessity upon his dying intestate. When a vendor dies intestate, leaving adult heirs, a suit is not an inevitable necessity; on the contrary, he may reasonably presume that if a purchaser from him becomes entitled to a conveyance from his heirs-at-law, they will not refuse to execute it; it would be presuming that they would deny a right and so commit a wrong.

Judgment. It has been held, though the rule is otherwise now, that the estate of an intestate vendor should bear the costs of the purchaser, because it was his duty, having made a contract to convey upon payment of purchase money, to provide by will or otherwise for a conveyance being executed upon such payment being made. It is obvious that there was much more reason in such a rule where the heirs were infants than when they were adults. But the rule being changed so that even where such omission on the part of the vendor entailed, in the event of his death, an inevitable necessity for a suit to obtain title, his estate was not answerable in costs; it appears to me *a fortiori* that his estate should not be answerable when his omission only *might* occasion a suit;—where a suit would be necessary only upon a wrong being done by the heirs-at-law; in which event too he would have his costs against the wrongdoer.

The conduct of the personal representatives has been correct, and the plaintiff must pay them their costs. It has, I believe, been the practice of this Court to make the personal representative of the vendor a party. The

cases lead me to doubt whether this is done in England, at least, where the purchaser's case is that he has paid all his purchase money. He must, of course, *prove* that he has paid it, before he establishes his title to a conveyance; but there are many cases, and this is one of them, in which he may satisfy the Court without the presence of the personal representative that the purchase money was paid. The contract in this case expresses that promissory notes were given for the purchase money. The purchaser produces these promissory notes and has also the "quit-claim deed" given to him by the personal representatives. In such a case, unless there is an inflexible technical rule that the personal representative must, in every such suit, be made a party, he would not be a necessary party. If a necessary party at all, he might be made a party in the Master's office for the representative of the personal estate, as he could have no interest in resisting the purchaser's suit. I think it very possible that in this case the personal representatives were made parties in order to the plaintiff's getting costs against the estate, in which they fail.

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Judgment.

The result is, that the plaintiff gets a decree for a conveyance with costs against the heirs-at-law (with the exception of the married woman): that he gets no costs against the estate of the vendor, and pays the costs of the personal representatives.

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## SMITH V. RATTÉ.

*Demurrer—Ferry—Frontier.*

*Held*, on demurrer, that the words "provincial frontier," used in section 5 of 20 Victoria, chapter 7, refer to the provincial frontier opposite the United States, and not to the boundary line of division between Upper Canada and Lower Canada.

This was a demurrer to a bill filed to restrain the defendant from infringing or interfering in any way with the right of ferry between the City of Ottawa and the Township of Hull, granted by the Crown to the plaintiff.

Mr. *J. A. Boyd*, for the demurrer.

Mr. *Osler*, contra.

**Judgment.** VANKOUGHNET, C.—The bill in this case is filed to restrain the defendant from interfering with an alleged right of Ferry granted by letters patent to the plaintiff, for ten years, across the river Ottawa, from the city of Ottawa, in Upper Canada, to the shore of the river in the township of Hull, in Lower Canada.

It is contended that the patent is void, 1st, because the Crown could not grant such a patent; 2nd, that it is uncertain in its terms.

It is contended that the Crown could only license the ferry in accordance with the provisions of chap. 46, Consolidated Statutes of Upper Canada, and that the very first of these provisions which enacts "That no license of ferry in Upper Canada shall in future be granted to any person or body corporate, beyond the limits thereof, and all grants of ferry on the frontier line of Upper Canada shall be issued to the municipality within the limits of which such ferry exists," is violated

by the license here given, inasmuch as it extends beyond the limits of Upper Canada, and the ferry is on the frontier of Upper Canada.

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I am of opinion that this ferry, wholly within Canada and crossing the boundary line of division between Upper Canada and Lower Canada, is not on the frontier line of Upper Canada within the meaning of the Act. The "frontier line" of Upper Canada has always been understood to be the line on that front which lies opposite to the neighboring territory of the United States.

The line of division between Upper Canada and Lower Canada has never been spoken of as the frontier line of either the one or the other Province. The language of the Consolidated Act in the 1st section is abstracted from section 5 of chapter 7, 20 Victoria, as amended by chapter 41 of 22 Victoria. This section 5 reads Judgment. thus:—"And as in order to encourage the establishment of good ferries for the accommodation of commerce on the line of the provincial frontier, it is essential to place the control and management of the same in the municipalities immediately interested; no license shall in future be granted to any person or body corporate beyond the limits of the Province, but such license in all cases shall be granted to the municipality within the limits of which such ferry exists, or in case of the establishment of an additional ferry on the provincial frontier, then to the municipality in which any such additional ferry shall be established."

It is manifest, I think, that the provincial frontier here meant is the frontier opposite the United States; and I think it equally manifest that it is only a license of ferry beyond the limits of Canada, which the Legislature meant to restrain. It is true, that the Consolidated Statute provides "that no license of ferry in Upper

1867. Canada shall be granted beyond the limits thereof;" but

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I think that we must read it in connection with what follows, as showing that the grant beyond the limits of Upper Canada means a grant beyond the limits of the frontier line of Upper Canada. This is very clear from the language of the fifth clause of the 20th Victoria, and we may look to it to see what the Legislature really did mean. I don't think that the Consolidated Statute necessarily alters this meaning; which, I think, should govern, as being the reasonable and convenient one, and that intended by the Legislature when the original statute was passed. It would be extremely inconvenient to hold that the Consolidated Statute had made any difference in this respect, for there is no corresponding provision in Lower Canada, where there is no such frontier line as in Upper Canada, on which a right of ferry could be granted—nor indeed is there any Legislative provision there which would affect the

Judgment

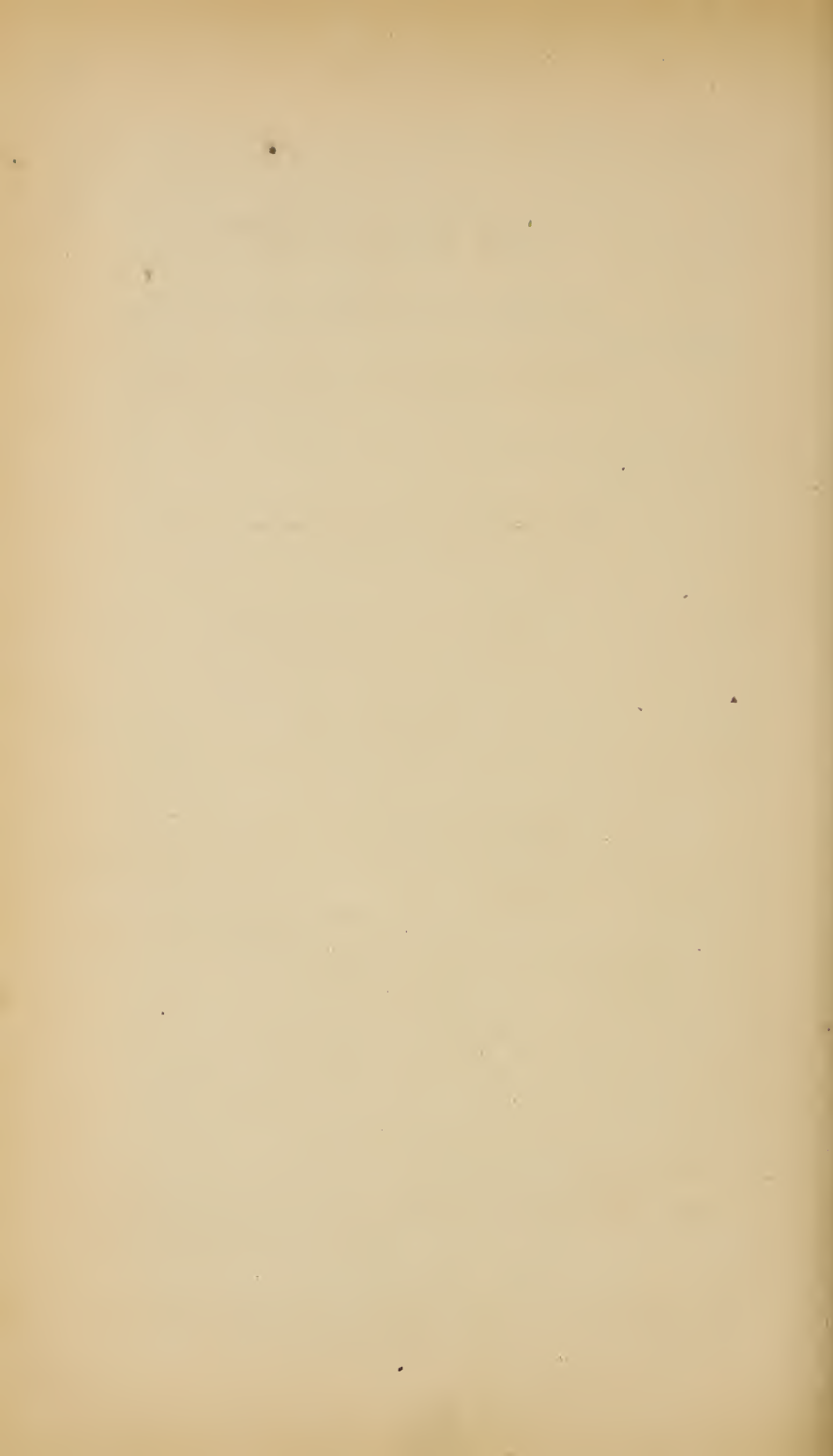
ferry in question. If then, the Crown, as to this ferry lying between Upper Canada and Lower Canada, or treating it as two ferries—one in Upper Canada and one in Lower Canada, lying on opposite sides of the river—were, as to the ferry in Upper Canada, bound by the provisions of the Consolidated Statute (chap. 46), the ferry or portion of the ferry in Upper Canada, could only be disposed of by public competition, while that in Lower Canada could be disposed of on such terms and to such persons as the Crown chose. It would require very plain words to deprive the Crown of the right of ferry, and of course of the power to grant that right within its own dominions, and as the Legislature, in passing the Statutes referred to, were not dealing with any such right, but with ferries extending beyond the limits of Canada or Upper Canada into the waters or territory of the United States, I think the right of the Crown to dispose of the ferry lying on and across the river Ottawa, is unaffected by those Statutes and that the patent is therefore, as against this objection, good.

I also think the patent sufficiently certain in its terms. 1867.  
The limits of the ferry can be ascertained without difficulty. The term of years for which the license is granted is fixed, and the conditions are precise and intelligible.

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Demurrer overruled with costs, with leave to answer on usual terms.

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### AFFIDAVITS.

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### AFTER ACQUIRED ESTATE.

A devise of all a testator's real estate passes all he owns at the time of his death.

Whateley v. Whateley, 436.

[Since re-heard and now to stands for judgment.]

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### AGREEMENT (VERBAL).

See "Mortgage," 3.

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### ALIEN FRIENDS.

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### ALIENATION OF MARRIED WOMAN'S ESTATE.

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## AMENDMENT OF BILL.

(AFTER NOTICE OF MOTION FOR INJUNCTION.)

1. Where a motion for injunction stood over, and before it was again brought on, the plaintiff amended his bill by adding parties necessary to the suit, for the purpose of obtaining the relief sought thereby, and in the absence of whom such relief would not have been granted, and again brought on the motion without giving a fresh notice: the Court refused to hear the motion on this objection being taken.

Westacott v. Cockerline, 159.

2. Where after serving a notice of motion for injunction, and before the motion is made, the plaintiff amends his bill: such amendment is an answer to the motion.

McDonell v. Street, 168.

See also "Practice," 7.

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 APPEAL.

(FROM MASTER.)

Where a party appealed on certain grounds against the Master's report, and some of these were allowed and the report referred back to be reviewed:

*Held*, that an appeal against the further report thereon would not lie for matters disposed of by the first report and not objected to on the first appeal.

Ross v. Perrault, 206.

(FROM CHAMBERS.)

[Within and for what time to set down.]

See "Practice," 8.

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 APPORTIONMENT OF COSTS.

Where, on an appeal from a Master's report, some of the objections are allowed with costs, and some are disallowed with costs, the appellants are entitled to all the costs of the appeal that are exclusively applicable to the objections allowed, and to a share of those costs common to all the objections according to, not the mere number of the objections as stated in the notice, but to the really distinct grounds of appeal. The same rule applies to the respondent's costs.

The Bank of Montreal v. Ryan, 204.

## APPROPRIATION OF PURCHASE MONEY.

See "Interest."

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## ASSESSMENT.

Where a bill to restrain proceedings for collecting the township assessments of the year, on the ground of objections of form, and because of an overcharged assessment of small amount, was filed after it was too late to apply at law to quash the by-law complained of, the Court, under the circumstances, affirmed on re-hearing a decree dismissing the bill with costs.

Grier v. St. Vincent, 512.

*Quære*, whether a township council is at liberty to provide for abatements and losses which may occur in the collection of the county rate in respect of personal property.—*Ib.*

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## ASSIGNMENT.

See "Executors," 3.

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## BANK CHEQUES.

1. If a Bank refuse to pay a cheque when they have sufficient funds of the drawer for the purpose, the holder can compel payment in equity. But the circumstance of there being sufficient at the drawer's credit in the Bank Ledger at the time of the cheque being presented, is immaterial, if the ledger did not shew the true state of the account.

The Gore Bank v. The Royal Canadian Bank, 425.

2. The Royal Canadian Bank held a draft payable in Buffalo and accepted by a firm there, and for which they held in security certain flour. On the day before the draft matured, it being suggested by the drawer that the flour had not been sold, the Bank agreed to discount a renewal draft on the same parties and on the same security, and passed the proceeds of the renewal to the credit of the drawer, but neglected to charge him with the original draft. Before the letter from the Bank to their Buffalo correspondents respecting the transaction reached Buffalo, the flour was sold and the original draft paid by the drawees, and they therefore did not accept the renewal :

*Held*, that the drawer was not entitled to demand from the Bank the proceeds of the renewal; and that the holder of his cheque was in no better situation than the drawer.—*Ib.*

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### BILL OF COMPLAINT.

(SERVICE OF.)

See "Practice," 5, 6.

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### BILL OF EXCHANGE.

Where C. shipped flour to the order of a Bank for account of L., and at the same time drew on L., discounted the bill at the Bank, indorsed and delivered to the Bank the carrier's receipt, and signed a memorandum stating that the receipt had been indorsed as collateral security for the payment of the draft, the Bank to sell the flour, applying the proceeds to pay the draft, and to place the property in charge of any respectable broker or warehouseman, without prejudice to the Bank's claim upon any party to the draft.

*Held*, that the Bank, though bound to retain the flour until the bill was accepted, might then, if they chose, deliver the flour to L., the fair construction of the agreement being that the retaining of possession until payment was optional with the Bank.

Clark v. The Bank of Montreal, 211.

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### BILL OF LADING.

See "Bill of Exchange."

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### BOARDS OF TRADE.

See "Insolvency," 6.

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### CHANCERY SALE.

One of the testator's sons bid at a Chancery Sale of his father's property, such bidding being by those present supposed to be for himself, but being in reality for another person, who had secretly employed the son to bid under the expectation that there would be less competition against the son than against a stranger, and the property was knocked down to the

son, but the contract thereupon was signed by his principal, and it appeared that the effect of the son's bidding being supposed to be for himself, had been to deter others from bidding; the Court, holding this to be a surprise on other bidders and an unjust advantage to the purchaser, refused to enforce the purchase, and directed a re-sale at the risk and cost of the purchaser.

### Rodgers v. Rodgers, 143.

[On a re-sale the property was bid off by the same purchaser at an advance of about \$560 on the price bid at the first sale.]

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## CHARITABLE USES.

(VOID DEVISE TO.)

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## CHURCH—SITE FOR.

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## COLLATERAL ISSUE.

In a suit to declare conveyances to a wife void as against creditors, it was alleged that the land had been conveyed by the father of the wife to the husband after executing his will, (whereby he devised the same property to his said daughter,) under pressure and undue influence such as, if true, to render the deed liable to be impeached on those grounds; but the Court refused to try such issue in the present suit, as the creditors of the husband were entitled to make out of his title to the property at the time of the conveyance impeached what they could towards satisfaction of their claims.

### Pegg v. Eastman, 137.

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## COMMISSION.

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## CONDITION.

(WAIVER OF.)

See "Lease," 1.

## CONSTRUCTION.

On a petition to obtain the opinion of the Court on the construction of a will, under 29 Vic. ch. 28, sec. 31 :

*Held*, that the Court could not give any opinion on such a point upon petition ; and the Court declined to make an order saying whether a bill would be proper.

*In re Cæsar's Will*, 210.

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(OF LOST WILL)—PROOF OF.

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## CORPORATOR.

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See "Parties," 6.

## CORPORATION.

A Company incorporated for the purposes of improving the navigation of the Grand River, is bound to exercise its powers reasonably, so as to avoid doing any unnecessary injury to neighbouring proprietors.

*Moore v. The Grand River Navigation Co.*, 560.

## COSTS.

1. The owner of land deposited his title deeds on the 19th of May, for the purpose of having prepared a mortgage thereof, which was accordingly made out and executed on the 30th of the same month. The preceding day the mortgagor made a lease, of which, however, the mortgagee had not any notice. A bill filed by the lessee to restrain proceedings at law under the mortgage was dismissed ; but, the mortgagee having in his answer deliberately sworn either to what was untrue, or to

what he did not know to be true, the Court refused him his costs, although costs were given to the other defendants.

McKay v. Davidson, 498.

2. Where an appeal from the report of the Master in a foreclosure suit failed on the main point, and succeeded only in respect of a small sum, the Court gave the respondents the costs of the appeal.

Brownlee v. Cunningham, 586.

(APPORTIONMENT OF.)

“See Apportionment of Costs.”

(MORTGAGE TO SECURE.)

See “Solicitor and Client,” 2.

(OF AND AGAINST EXECUTORS.)

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“Injunction,” 5, 6.

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## COVENANT.

(INDEPENDENT.)

See “Specific Performance,” 2.

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## DAMAGES.

(FOR MISCONDUCT OF CO-PARTNER.)

See “Partnership,” 3.

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## DECREE.

1. W. entered into a contract for the purchase of property, the price being payable by instalments; and there being a

mortgage on the property to the Trust and Loan Company which was not due, the vendor was to give the vendee W. a bond of indemnity in respect of the mortgage. A decree was made at the suit of the vendor for specific performance, on the undertaking of the plaintiff, recited in the decree, to procure a release or discharge of the mortgage; and the over due instalments were ordered to be paid into the Bank subject to the further order of the Court. On a question subsequently arising as to the effect of this undertaking, it was *held* that the performance of the undertaking was not a condition precedent to the paying in of the money, but was a condition precedent to its being paid out.

Robson v. Wride, 419.

2. A sum of money having been paid in under the decree, an application was made by the plaintiff to have it paid out, which the Court declined to order without an unconditional execution of a discharge by the Company. A deed sealed by the Company, but which had never been delivered was then, through some misunderstanding, submitted to the Court as duly executed and delivered, and on the faith of this representation, the money was paid out accordingly. On the facts being subsequently discovered by the defendant, and brought before the Court on petition, the Court ordered the restoration of the money.—*Id.*

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### DELIVERY OF POSSESSION.

An order for delivery of possession is only made against persons not parties, when they acquired possession *pendente lite* from a party to the suit, and have no pretence of having a paramount title, though the rule may be somewhat broader in the case of Receivers and Sequestrators.

The Bank of Montreal v. Wallace, 184.

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### DEMURRER.

1. A claim was compromised, the creditors agreeing to receive in satisfaction part of the debt, secured by acceptances of B. indorsed by C. who were no parties to the contract. Before the acceptances were given, a bill was filed by the debtor and proposed acceptor for the specific performance of the agreement:

*Held*, on demurrer, that the latter was improperly joined as co-plaintiff.

The absence of any allegation that the proposed indorser had indorsed or was ready and willing to indorse, was also held to be a fatal objection.

### Gartshore v. The Gore Bank, 187.

2. Where a bill is filed to restrain the seizure of the goods of A. on an execution against B., on the ground that the goods have a peculiar value which damages would not compensate, there should be distinct and precise allegations of the necessary facts: and a general allegation that the damage will be irreparable is not sufficient, on demurrer.—*Ib.*

See also "Parties," 2.

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### DEPOSIT OF TITLE DEEDS.

See "Mortgage," &c., 1.

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### DESCENT.

Where a party claims as one of the heirs of the half-blood of an intestate, and in his bill professes to set out how his interest arises, it is necessary for him to negative the fact of the intestate having obtained the land by gift or devise from an ancestor; or if he did so obtain it, the claimant must shew that he is of the blood of such ancestor.

Tryon v. Peer, 311.

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### DEVISE—IN TRUST TO SELL.

See "Executor," 4.

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### DISCHARGE OF INSOLVENT.

See "Insolvent," 1, 2.

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### DISCRETIONARY POWER.

The Court will reluctantly interfere with a Company's discretion where amongst engineers there may be a difference of opinion; but as it appeared in this case that the damage complained of by the plaintiff might be avoided by certain

alterations of the Company's works, suggested by an eminent engineer to whom the matter was referred by the Court, and it being stated on behalf of the Company, that these alterations would have been made by the Company if suggested before suit; the Court decreed the making thereof agreeably to the engineer's report.

Moore v. The Grand River Navigation Co., 560.

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## DISPENSING WITH SERVICE.

[OF PERSONAL REPRESENTATIVE.]

See "Personal Representative."

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## DISSOLUTION.

See "Partnership," 2.

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## DOWER.

See "Will," 4.

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## ELECTION.

See "Will," 4.

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## EQUITY OF REDEMPTION.

(IN DISPUTE.)

See "Mortgage," 5.

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## ESTOPPEL.

See "Rector."

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## EVIDENCE.

1. A husband is not a competent witness for his wife in a

suit respecting her separate estate, though he may have no interest therein.

### Lindsay v. The Bank of Montreal, 63.

2. Where at the hearing the competency of a witness was objected to, and the court received the evidence subject to the objection, but afterwards held the witness incompetent, a reference was directed as to the material points to which his evidence applied and further directions were reserved.—*Ib.*

3. In a suit against parties named as executors in a will, seeking to make them responsible as such, notwithstanding their renunciation of the executorship; a legatee under the will is not a competent witness to establish the liability of the defendants.

### Vannatto v. Mitchell, 665.

See also "Practice," 11.

"Tax Titles," 1.

"Trusts," &c., 4.

## EXCESSIVE PRICE OF LAND.

See "Undue Influence."

## EXECUTION AGAINST LANDS.

See "Locatee of Crown."

## EXECUTOR.

1. Where advances were made by way of loan to the managing executor of an estate, as such, and subsequently security was taken therefor from him on part of the assets of the estate, such advances being made and security taken in good faith on the part of the lender, and it appeared that some of the advances were duly entered in the books of the estate, and the name of the lender (who had no other transactions with the estate) appeared as a creditor in several annual balance sheets sent to the other executors by their agent, and no objection on their part was ever made; the Court refused, at the instance of such executors, to order the securities to be delivered back to them, without payment of such advances.

Ewart v. Gordon, 40.

2. Where the same persons are executors and trustees under a will, they do not lose their powers as such executors and become mere trustees, when all the testator's known debts are paid, or by mere lapse of time.—*Id.*

3. Five executors and trustees took an assignment of a mortgage to two of their number, described therein as executors and trustees under the will of the testator, the assignment containing no further reference to the will: the agent for the five thereupon gave notice to the mortgagor that the assignment had been made to the executors, and it did not appear that the mortgagor had any other notice of the assignment:

*Held*, that he was justified in assuming that the assignment was made to the executors as such; and payments to one of them made *bona fide*, were held valid.

Ewart v. Dryden, 50.

4. Devisees in trust for sale of real estate must jointly receive or unite in receipts for the purchase money, unless the will provides otherwise, and the case is not affected by the property being charged with debts, and the power of sale being to the executors *eo nomine*.

Ewart v. Snyder, 55.

5. Where a mortgage was taken and the mortgagees were therein described as executors and devisees in trust, payments to one were held not to be thereby authorised.—*Id.*

6. A testator's directions to his executors to continue to carry on business with his surviving partners, does not authorise the executors to embark any new capital in the business.

Smith v. Smith, 81.

7. One of two executors was indebted to the estate on a mortgage given to their testator, of which fact his co-executor was aware, but he took no steps to compel payment, and the mortgagor as executor executed a discharge of the mortgage, under the Statute, and registered the same:

*Held*, that the co-executor was liable to make good any loss occasioned to the estate thereby; but,

*Quære*, whether the discharge to be valid did not require the signature of both executors.

McPhadden v. Bacon, 591.

8. Executors suffered judgment to be recovered against them at law for a debt of their testator; and the lands were sold upon process issued thereon, although one of the executors was in-

debted to the estate in a larger amount; the Court ordered both executors to make good the difference between what the lands were actually worth, and the amount realized upon the sale under execution.—*Ib.*

9. Three persons were named as executors; after the death of the testator they declined to prove the will, and renounced probate, but expressed their willingness to assist the family with their advice in settling up the affairs of the estate; and accordingly they assisted in preparing a list of debts due by the estate, and of the assets and value thereof; it was also shewn that on being spoken to by a creditor of the estate, one of them stated that they had been named as executors, assured the creditor that he was all right, and that there was enough to pay the debts; another of them subsequently wrote to the widow of the testator, stating that he and the other parties named "were in Port Hope yesterday, and, after taking legal advice on the subject, have relinquished all further action on the will."

*Held*, that these facts did not shew such an acting with the estate as would render the parties liable as executors, in opposition to their renunciation.

Vannatto v. Mitchell, 665.

10. Where executors named in a will, renounce probate, what acts or dealings will, notwithstanding, render them liable as having assumed the duty of executors considered.—*Ib.*

(COSTS OF AND AGAINST.)

See "Practice," 2, 3, 4.

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EXPRESS NOTICE.

See "Registration," 3.

"Unregistered Assignment," 1.

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FALSE PRETENCES.

See "Partnership," 2.

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FIERI FACIAS.

(AGAINST GOODS AND LANDS.)

A judgment creditor had issued at the same time, and placed in the hands of the Sheriff, alias *fi. fas.* against goods,

and *fi. fas.* against lands; the Sheriff by direction of the creditor made a seizure of goods; the writs against goods were afterwards and before sale thereunder withdrawn; but meanwhile the debtor had conveyed his land in trust for creditors:

*Held*, that the grantee was entitled in equity to restrain a sale under the *fi. fas.* against lands.

Paton v. The Ontario Bank, 107.

See also "Practice," 1.

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### FIRE POLICY.

A fire policy, after a loss has taken place, and money has become payable thereon, is such a specialty or security for money as is seizable under execution, though the amount payable has not been ascertained.

The Bank of Montreal v. McTavish, 395.

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### FORECLOSURE.

A bill of foreclosure on a mortgage by the churchwardens of a church at Brampton, claimed a lien for advances made by the mortgagee subsequent to the execution of the mortgage. One of the defendants, who had ceased to be a churchwarden, put in an answer disputing this claim, the other defendants allowed the bill to be taken *pro confesso*. At the hearing the plaintiffs abandoned their claim for the subsequent advances. The Court dismissed the bill without costs as far as it related to this claim.

Hamilton v. Banting, 485.

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### FRAME OF BILL.

See "Demurrer," 2.

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### FRAUD.

A. gave B. and C. a note signed by himself, which they discounted; when it matured B. and C. delivered to the holder, by way of renewal, a note purporting to be made by A., like the other note, and which such holder on that faith accepted, and he delivered up the old note. It being afterwards alleged that the renewal was not signed by A., but by another person

of the same name, unknown to the holder and resident in a foreign country.

*Held*, that A. could not take advantage of this fraud; that his liability in respect of the note still existed in equity; and that the holder could sue within six years from the discovery of the fraud.

Irwin v. Freeman, 455.

See also "Insolvency" 3.

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### FRAUDULENT CONVEYANCE.

A person having a claim against a party in insolvent circumstances made a present of it to his sister, the wife of the insolvent, in order that she might thereby obtain from her husband a deed of his property in consideration of such debt, which she did through the intervention of a third party who conveyed the land to her. The court set aside the conveyance at the instance of a creditor of the husband as void under the Statute 13th Elizabeth, and the Indigent Debtor's Act of this Province.

Pegg v. Eastman, 137.

See also "Voluntary Conveyance."

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### FRAUDULENT JUDGMENT.

A. commenced a suit against B., who had been previously sued by C., the plaintiff. Both suits were in the Superior Courts of law; but A. obtained judgment first, chiefly by having his case brought down and tried in the County Court. A. issued execution and sold the goods of B., who was his son, after which he issued execution against B.'s lands for the residue, and advertised them for sale. C. then filed his bill, charging that, at the time of recovering judgment nothing was due from B. to A., and that the judgment was collusive and fraudulent. But it appeared in evidence that A. had advanced various sums of money to B., or paid them on his account, and also gave him goods to a considerable amount, while there was no evidence of anything having been paid or given on account by B.:

*Held*, that the judgment of A. was good, under the circumstances; but C. consenting to allow A. to examine B. as a witness, a reference was directed to ascertain the amount actually due from B. to A. at the time of A.'s recovering judgment, reserving further directions.

Stevenson v. Nichols, 489.

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## FRAUDULENT PREFERENCE.

Where a fire policy after a loss had taken place was verbally assigned to a creditor by a person in insolvent circumstances, in satisfaction of a debt not yet due, and in consideration of an advance of money at the time, the assignment was held void, as a fraudulent preference within the Consol. Stat. U. C., Ch 26. Sec. 18.

The Bank of Montreal v. McTavish, 395.

See also "Insolvency," 4.

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## FREE CHURCH OF SCOTLAND.

See Specific Performance, 8.

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## FRONTIER.

(PROVINCIAL.)

See "Provincial Frontier."

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## GOODS AND LANDS.

(SIMULTANEOUS WRITS AGAINST.)

See "Fieri Facias," 1.

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## GRANT FROM THE CROWN.

Although parties dealing with the Crown will be held to the strictest good faith, yet, where it is shewn that the patentee of land was ignorant of a fact which might have been material to bring under the notice of the officers of the Crown, and the plaintiff had the opportunity but failed to do so, and subsequently filed a bill impeaching the patent as having been issued in error and improvidence, the Court refused the relief prayed, and dismissed the bill with costs.

Mahon v. McLean, 361.

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## HEARING.

See "Practice," 7.

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## HUSBAND AND WIFE.

Although the policy of the law is to induce a man and wife to resume co-habitation notwithstanding they may have agreed to a separation, and that on such renewal of co-habitation a deed of separation will be held void ; still where property was conveyed to a trustee for the support and maintenance of a wife and her children in settlement of a suit for alimony, and the husband and wife afterwards renewed co-habitation, but the husband subsequently deserted his wife and family, the Court refused, at the instance of the husband, to set aside the deed.

McArthur v. Webb, 303.

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## IMPROVEMENTS.

(COVENANT TO PAY FOR.)

See "Rector."

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## INCORPOREAL FREEHOLD.

See "Mineral Lands," 1.

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## INDEPENDENT COVENANTS.

See "Specific Performance," 2.

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## INFANTS.

See "Mortgage," &c., 2.

(SECURING MONEYS OF.)

The rule is that moneys belonging to infants is not ordered in equity to be paid to their guardian, whether appointed by the Surrogate Court or otherwise, but is secured for the benefit of the infants under the authority of this Court :

But the rule may not apply where the amount is small and is required for the maintenance, education or other immediate use of the infants, or where some other special circumstances exist justifying an exception to the general rule.

Mitchell v. Ritchey, 445.

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## INFORMALLY EXECUTED INSTRUMENT.

See "Volunteer."

## INFORMATION—FORM OF.

An information in the name of the Attorney General not signed by him, but on which was indorsed a fiat "Let the within information be filed," signed by the Solicitor General: *Held*, irregular.

The Att. Gen. v. The Toronto St. Railway Co., 441.

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INJUNCTION.

1. The plaintiff had duly registered under the Statute, as his trade mark in the manufacture of soap, the word "Imperial," with a star following it—the defendant, in his manufacture of soap, put on his boxes the words "Imperial Bibasic Soap." An injunction was granted restraining him from using the word "Imperial," as being a portion of the trade mark of the plaintiff.

Crawford v. Shuttock, 149.

2. Where a mortgagor in possession was felling timber on the mortgage premises, the Court at the instance of a judgment creditor of the mortgagor, with an execution against lands in the hands of the Sheriff, granted an injunction to restrain future cutting, by the mortgagor, his servants, agents, and workmen, it being shewn that the property was a scanty security for the claims of the mortgagees and the amount due the execution creditor.

Wason v. Carpenter, 329.

3. An injunction may be granted against a plaintiff at the instance of defendant, before decree.

Stewart v. Kingsmill, 347.

4. The plaintiff carried on business in the City of L. having for his sign a figure of a gilt lion, and designating his place of business "The Golden Lion." The defendant for some years had had the conduct of this business, and having determined on commencing on his own account the same line of business, opened a shop, in front of which he placed a figure somewhat similar to that used by the plaintiff: the Court on the application of the plaintiff restrained the defendant from using as a sign this or any similar figure.

Walker v. Alley, 366.

5. An injunction while it stands should be obeyed; and where, after twelve weeks had elapsed from the service of the

injunction without the bill being served, the defendant treated the injunction as gone, the Court, while refusing a motion to commit for breach of the injunction, refused the defendant his costs of resisting the application.

Heron v. Swisher, 438.

6. Plaintiffs sold liquid medicine put up in bottles, labelled "Perry Davis's Vegetable Painkiller." Defendant subsequently sold a similar kind of medicine put up in bottles, labelled "The Great Home Remedy Kennedy's Painkiller." Plaintiffs claimed the word "Painkiller" alone as their trade mark. It was proved that the medicine of plaintiffs was known and sold in the market by the name of "Painkiller," before the defendant's was introduced, and that the trade would not be deceived by the defendant's labels, although the general public might be deceived. An injunction was granted restraining the use by the defendant of the word "Painkiller" as a trademark, with account of profits and costs.

Davis v. Kennedy, 523.

7. The defendant had built a drain from his premises to a lot of which the plaintiff became lessee. Being desirous of building on this lot, he requested the defendant to stop up or remove the drain, which the defendant at first refused, and afterwards neglected to do. It was alleged by the defendant that the cost of diverting the drain would have been \$14 only :

*Held*, that the plaintiff was not obliged to take the law into his own hands, and divert the drain, and sue the defendant for the expense; and it appearing that the plaintiff's building could not be safely proceeded with until the drain was stopped up or diverted, an injunction was granted, requiring the same to be done.

Macaulay v. Roberts, 565.

See also "Amendment of Bill."

"Laches."

"Patent Right."

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## INSOLVENCY.

1. The County Judge has a general jurisdiction in matters of insolvency, and may sanction a suit in the name of the assignee for the benefit of the estate, notwithstanding a majority, both in number and value, of the creditors pass a resolution forbidding further proceedings.

In re Lambe, 391.

2. An order to that effect having been made by the Judge, the assignee appealed therefrom in the interest of the creditors whose transactions the suit impeached for fraud, and the appeal was dismissed with costs; the Court observing that it was not the duty of the assignee to appeal from such an order at the expense of the estate.—*Ib.*

3. Where a person in business finds himself unable to pay twenty shillings in the pound, it may or may not be his duty to discontinue his trade, according to circumstances: continuing his business may be a fraud, but is not necessarily so.

In re Holt and Gray, 568.

4. Sub-sections 1, 2, 3, and 4, of section 8, of the Insolvency Act of 1864, do not prevent a debtor conveying lands to a creditor either in payment of, or as security for, his claim.

Newton v. The Ontario Bank, 652.

5. A. having manufactured a quantity of goods (a number of oil barrels) for a customer, drew upon him for the price, and applied to a banker to cash the bill, which the banker agreed to do upon receiving a lien on the goods, which was given, and the bill cashed accordingly. On the day following, the debtor made an assignment to an official assignee.

*Held*, First, that the transaction was not within either the terms or the spirit of the Insolvent Act.

Second, that if it were within the terms of the Act, the creditor was at liberty to rebut the presumption that the transaction was carried out in contemplation of insolvency.—*Ib.*

6. The provision in the Insolvency Act which authorises Boards of Trade to appoint official assignees, applies as well to unincorporated, as to incorporated Boards of Trade; and that, whether such Boards of Trade were in existence at the time of the passing of the Act or were subsequently created.—*Ib.*

[Since re-heard and stands for judgment].

### INSOLVENT ADMINISTRATOR.

Where an administrator brought an unfounded action against the testator's widow, which she was put to costs in defending:

*Held*, that she could not claim these costs against the estate, and that her only remedy was against the administrator personally.

Rodgers v. Rodgers, 457.

## INSOLVENT.

(DISCHARGE OF.)

1. A trader, after discovering that his affairs were not in a position to pay twenty shillings in the pound, continued his business, in the hope, which was not shewn to have been absurd or unreasonable, that he would thereby be able to pay all his debts in full and meet all his engagements; and, in the course of the business so continued, contracted some new debts; but was unsuccessful, and after a time found it necessary to make an assignment under the Insolvent Act:

*Held*, that he was not thereby disentitled to his discharge.

In re Holt and Gray, 568.

2. On an application for an order of discharge, the insolvent is entitled to read his own examination, though taken at the instance of a friendly creditor; and the only question is as to the weight to be attached to it.—*Ib*.

## INSURANCE.

1. When a party, on applying to effect an insurance of buildings, overstates the value of them, the policy will not thereby be avoided where it appears that such over-value was not made with a fraudulent intent.

Laidlaw v. The Liverpool and London Ins. Co., 377.

2. Where a party, on applying to effect an insurance, in answer to one of the interrogatories indorsed on the printed form of application, stated that he was the owner of the estate subject to a mortgage in favor of a Building Society for \$1,500; the facts being, that he only held a contract of purchase; that a portion of the purchase money remained unpaid; and that a mortgage for the amount mentioned had been agreed for, but not executed; of which facts the Company through their agent was aware:

*Held*, that the insurance was not avoided by the inaccuracy of the statements in the application, it not being shewn that such misstatement was intentional or material.—*Ib*.

3. A party on applying to insure omitted unintentionally from his description of the property, some particulars which he was not asked respecting, but which had the Company's agent known, he swore he would not have insured:

*Held*, that, there being no fraudulent concealment, the omission to set forth the particulars referred to, did not render the policy void.—*Ib*.

## INTEREST.

To save interest by an appropriation of the purchase money, the money should be separated from the purchaser's general bank account, and notice of the appropriation must be given to the vendor.

The Great Western Railway Co. v. Jones, 355.

See also "Timber Trade."

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## JOINT TENANT.

See "Partition."

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## JUDGMENT CREDITOR.

A judgment creditor had attached a debt due to the defendant, as a security for which land had been conveyed to the defendant, and a suit for redemption was pending. The bill in that suit was afterwards dismissed for default in paying the money, in pursuance of the report therein:

*Held*, that, the property having thereby in effect become substituted for the debt, the creditor was entitled to a sale thereof in this court, and payment of the proceeds towards satisfaction of the judgment.

The Bank of Elgin v. Hutchinson, 59.

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## JURISDICTION.

See "Discretionary Power."

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## LACHES.

Mere delay of a party to enforce his claim at law furnishes no ground for this Court interfering with his legal right, although it might be a good answer were he seeking specific performance of the contract here.

Allan v. Newman, 364.

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## LANDS AND GOODS.

(SIMULTANEOUS WRITS AGAINST.)

See "Fieri Facias."

## LAPSE OF TIME.

1. A will disposed of the beneficial interest in land, but left the legal estate to descend to the heir;

*Held*, that lapse of time falling short of the statutory bar, was no defence by a purchaser from the heir-at-law.

Smith v. Bonnisteel, 29.

## LEASE.

1. Two leases were executed between the same parties, and to the same effect, except that the first lease was for twenty acres and the second for ten acres, parcel of the twenty: It was a condition of the leases that the lessee should commence digging for oil on or before the first of June, 1861, which he failed to do. On the 16th of September, 1863, the lessor accepted from the lessee \$50, to be kept out of his share of the first oil obtained, and a memorandum to this effect was endorsed on the twenty-acre lease by the lessor, which instrument the lessor thereby declared that he considered valid. On the 30th of November, 1864, another memorandum was indorsed on the same lease, and signed by the lessor agreeing to extend the time of commencing work on the within lease until June, 1865. The lessor was until after this time beneficial owner of the property, and he subsequently sold the lot of which the ten acres were part; the purchaser having notice of the leases. On his subsequently obtaining a patent for the lot, the Court of Chancery decreed that the ten-acre lease, was binding on the patentee, and restrained him from bringing ejectment; and the decree was affirmed on appeal.

Flower v. Duncan. 242.

2. The owner of land made several leases of portions thereof wherein it was stipulated that the lessees should have a right to cut the timber thereon; and they on their parts covenanted to make certain improvements: the defendant accepted a lease in which it was agreed that the lessee should render up all improvements, but the lease did not bind him to make any.

*Held*, that the lease did not confer a right to cut the timber standing on the demised premises, notwithstanding the same were wild, and in a state of nature.

Goulin v. Caldwell, 493.

See also "Rector."

## LICENSE TO DIG.

See "Mineral Lands."

## LIMITATIONS—STATUTE OF.

See "Fraud."

"Lapse of Time."

"Township Council," 1, 2.

"Voluntary Settlement."

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LOCATEE OF CROWN.

This Court will, at the instance or a judgment creditor of a locatee of the Crown, with execution against lands in the hands of the Sheriff, direct the interest of the locatee to be sold, and order him to join in the necessary conveyance to enable the purchaser, under the decree, to apply to the Crown Lands Department for a patent of the land, as vendee or assignee of the locatee.

Yale v. Tollerton, 302.

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LOST WILL.

A will was prepared and sent to the testator, and was subsequently seen—signed by the testator in the hands of his wife—by the father of the residuary legatee and devisee, who read over the will, and, immediately on his return home, made a pencil jotting of the names of the executors as well as of the several bequests other than the provision for the wife; and five days before his death the testator told him that his will was still in existence, and that he had given it to a person, whom he refused to name, for the purpose of having a codicil prepared, and a second memorandum was made by him from the words of the testator, of what he said the will contained, which agreed substantially with the first memorandum. After the death of the testator no trace of the will could be discovered, and a bill having been filed for the purpose of establishing the will, the Court made a decree for that purpose and directing probate thereof to be granted to the executors named therein.

Bessey v. Bostwick, 279.

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LUNACY.

1. On an application in lunacy, the Court ordered the Sheriff to empanel a jury for the then next sittings of the Court. The matter was not proceeded with until the sittings succeeding the next, and the matter then coming on:

*Held*, that the panel was not properly constituted ; that the Sheriff's authority to summon a jury was confined to the first sittings after the date of the order.

In re McNulty, 464,

2. *Semble*, an alleged lunatic should receive the same notice of a trial before the Court, as of an inquisition under the former practice.—*Ib.*

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## MAINTENANCE.

(CONVEYANCE IN CONSIDERATION OF.)

See "Voluntary Conveyance," 2.

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## MARRIED WOMAN.

Where the certificate signed by two Justices of the Peace indorsed on a conveyance by a married woman as to her consent to part with her estate, &c.. omitted to state in the body thereof any place where the execution of the deed or the examination of the married woman took place, but, in the margin, the County of Prince Edward was given as the place wherein the Justices were authorized to act.

*Held* that such certificate sufficiently complied with the Statutes respecting alienations of the estate of married women.

Robinson v. Byers, 388.

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## MERGER.

*C.* being the sixth mortgagee, filed his bill against the holder of the equity of redemption and other incumbrancers. The prior mortgagees were not parties to the suit. A sale having been directed, was conducted by the Solicitors for one of the defendants, and *C.* became purchaser of the premises at a sum less than his mortgage debt. The conditions of sale contained the following clause :—"The said premises will be sold, subject to prior mortgage incumbrances, amounting in the aggregate to the sum of £1831." *C.* then bought up the three first mortgages and had them assigned to a trustee for his benefit, and in other respects shewed his intention to retain them as outstanding liens. He also entered into negotiations for time with the holders of the fourth and fifth mortgages, proposing as part of the terms, in case time were given him, to treat the first three mortgages as discharged. These negotiations failed. *G.*, the fifth mortgagee redeemed the fourth and foreclosed *C.*

as owner of the equity of redemption. The three first mortgages, having been assigned to the plaintiff—*held*, on a bill by him on them, against *G.*, that these three mortgages had not merged in *C.*'s equity of redemption, and that the negotiations between him and the present holders of the equity of redemption having proved abortive, could not be set up to bar the right of action of *C.* and his assignee upon these mortgages.

Beaty v. Gooderham, 317.

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### MINERAL LANDS.

1. The owner of lands, supposed to contain certain valuable ores, executed to two persons an instrument in writing, (intended to be under seal, but by mistake not sealed.) to dig for minerals on the land, they agreeing to give to the owner of the soil one-twentieth part of all the minerals they might find or take from the property.

*Held* (first), that the interest intended to be conveyed was an incorporeal freehold or tenement, and could only be created by an instrument under seal: (second) that if it was intended to operate as a *license only*, it would be revocable, and the Court would not make a decree to establish a right or interest which might be immediately revoked.

Ross v. Fox, 683.

2. The holders of a license to dig for ore made a voluntary transfer of their right to another, and subsequently the licensor duly conveyed, for value, a like privilege to others, who also purchased from the original licensees their interest, and entered upon and worked the lands. Nearly three years afterwards, the assignee of the first license filed a bill seeking to enforce an exclusive right to dig. The Court, under the circumstances, dismissed the bill with costs.—*Id.*

3. A party to whom a license to dig for ore (the grantor being entitled to a royalty of one-twentieth part of the ore,) was granted, was described in the instrument as a miner, and he subsequently transferred his right to another, without authority from the owner of the soil.

*Held*, that the case came within that class in which the personal skill, knowledge, or other personal quality of the grantee, is a material ingredient in the contract, and therefore the right could not be assigned.—*Id.*

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### MISJOINDER.

See "Demurrer," 1.

MISTAKE.

(PAYING MONEY OUT OF COURT IN.)

See "Decree," 2.

MONEY.

(PAID OUT OF COURT IN MISTAKE.)

See "Decree," 2.

(ORDERED INTO COURT.)

See "Trusts," &c. 6.

MORTGAGE—MORTGAGOR—MORTGAGEE.

1. Where mortgages are deposited as security for advances, and the mortgagor subsequently acquires the equity of redemption, the depositor's lien on the property is not confined to the amount of the mortgages.

Jones v. The Bank of Upper Canada, 74.

2. Where the heirs of the mortgagor are infants, and a foreclosure suit is instituted, the rule of the Court is to grant a reference, as of course, to inquire whether a foreclosure or sale is more for the benefit of the infants: but if affidavits are filed to satisfy the Court as to the proper decree, or if the guardian consents, the reference may be dispensed with.

Dudley v. Berczy, 141.

3. Where a tenant in possession being mortgagee of the property, and indebted to the mortgagor under an award in a sum exceeding the amount due under the mortgage, a settlement and compromise between the parties was effected, whereby the mortgagor agreed to discharge the amount due under the award, and also pay the mortgagee \$100 to go out of possession. Although not distinctly shewn either by parol or writing, yet the facts and circumstances were such as to induce the belief that the arrangement embraced a discharge of the mortgage debt, and the Court dismissed a bill of foreclosure filed by the mortgagee several years afterwards.

Fair v. Tate, 160.

4. Where a mortgage was to secure advances to be thereafter made from time to time, and interest thereon, and there were mutual accounts between the parties, the items of which were entered in the mortgagee's books, with the concurrence of the mortgagor, who was his clerk:

*Held*, that the credits given therein to the mortgagor were first applicable to the interest on all these advances, and then to the eldest of the principal sums charged.

Ross v. Perrault, 206.

5. Where there is a dispute as to the ownership of the equity of redemption, the decree in a foreclosure suit should usually contain a direction to the Master to inquire as to the ownership before a day is appointed for payment of the mortgage money.

Cayley v. Hodgson, 433.

6. A mortgage was vested in trustees. One of them brought an action at law on the mortgage as plaintiffs' attorney. A bill was afterwards filed by another solicitor to foreclose the mortgage :

*Held*, that the plaintiffs were not entitled to the costs at law in addition to those in equity.

Ontario v. Winnaker, 443.

7. In a suit for foreclosure upon a mortgage given by the purchaser for part of the purchase money, damages or loss sustained by failure of title or of incumbrances or charges on the property sold, cannot, under the covenants for title, form the subject of set-off to the amount secured by the mortgage, before the amount is ascertained by action or otherwise.

Hamilton v. Banting, 485.

8. A mortgagor conveyed part of the mortgaged property to a purchaser, the mortgagor covenanting against incumbrances ; and the mortgagee subsequently released the part so sold from his mortgage :

*Held*, that, as this release was in accordance with the mortgagor's own obligation as to that part, it did not affect the mortgagee's right to recover the mortgage debt, or his lien on the rest of the mortgaged property.

Crawford v. Armour, 576.

9. Where a mortgagee and mortgagor sell and convey part of the mortgaged property, without the concurrence of a person to whom, subsequently to the mortgage, the mortgagor had sold the remainder of the property, and whose interest was known to the mortgagee ; and the mortgagee covenanted for freedom from incumbrances :

*Held*, that, the mortgagee having thereby put it out of his power to re-convey the whole of the mortgaged property, he could not call on the owner of the remaining portion for payment of the balance of the mortgage money.

Gowland v. Garbutt, 578.

10. This rule does not apply where the sale is under a power contained in the mortgage, or where the mortgage is of chattels which a mortgagee has a right to sell without any express power.—*Ib.*

11. But it applies to a sale under a decree in a suit to which the owner of the unsold portion was no party.—*Ib.*

12. Where the mortgagee's right to claim a lien on the unsold portion has thus been put an end to, it is not revived by his, two years afterwards, obtaining the consent of the first purchaser to a reconveyance on payment of the mortgage money.—*Ib.*

See on same subject *Guthrie v. Shields*, 585, (*note*).

13. A decree was made for the foreclosure of a mortgage given for £100 with interest; it appeared by the defendant's evidence in the Master's office that no money was advanced by the mortgagees: and the Court held, chiefly on the conduct of the parties, and the circumstances of the case, that the mortgage was intended as a security for a note of the mortgagor's, indorsed by the mortgagees contemporaneously with the execution of the mortgage, and for any subsequent transactions with the mortgagor growing out of it.

*Brownlee v. Cunningham*, 586.

14. An equitable mortgagee is, after default by the mortgagor, entitled to a Receiver where the mortgagor is in possession, whether the security is scanty or not; and he need not make a prior mortgagee who has the legal estate a party to the suit.

*Aikins v. Blain*, 646.

See also "Executors," 2, 3, 7.

"Foreclosure."

"Injunction," 2.

"Sheriff's Sale," 4.

"Solicitor's Lien."

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## MORTMAIN ACTS.

A testator by his will directed all his estate, real and personal, to be sold, and out of the proceeds gave \$1,000 each to "The Rochester Theological Baptist Institution," and to "The American Baptist Missionary Union Society," and after the payment of these and certain other legacies, directed "all the remainder and residue of his estate to be distributed, at the discretion of his executors, to the support of Christianity throughout the world; such as bible, tract, missionary societies and institutions of learning of the Baptist denomination."

*Held*, void under the statutes of mortmain, so far as the same affected the realty.

Anderson v. Kilborn, 219.

See also "Will," 5.

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### MOTION IN EQUITY.

(AFTER REFUSAL AT LAW,)

See "Practice," 1.

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### MUNICIPAL COUNCIL.

Sums were credited by the Treasurer of a County in the Corporation books to certain Townships, in respect of the non-resident land fund. Portions thereof were paid over to the Townships, and other sums were in the same books charged against one of the Townships which the Township considered itself not chargeable with. The Treasurer's books, containing these entries, were audited and approved by the County Council, but no by-law had been passed by the County Council appropriating the fund:

*Held*, that the Townships had no relief in equity.

The Corporation of the United Counties of  
Mara and Rama v. The Corporation of the  
County of Ontario, ..... 347.

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### MUNICIPAL DEBENTURES.

See "Public Securities."

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### NEGLIGENCE.

See "Solicitor's Bill."

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### NOTICE—EXPRESS.

See "Registration, 3."

"Unregistered Assignment," 1.

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### NOTICE OF MOTION.

In giving notice of motion and that the party moving will read certain affidavits, if the same are filed at any time before the date of the notice of motion, the notice must state the day of the filing thereof, otherwise the affidavits cannot be used on the motion.

Lavin v. Fraser, 183.

NUISANCE.

See "Injunction," 7.

OFFICERS.

See "Township Council," 2.

OIL WELL.

See "Specific Performance," 2, 7.

"Lease," 1.

ORDNANCE LANDS.

The purchase money of Ordnance Land, comprised in the second schedule of the Act, 19 Victoria, ch. 45, but sold by the principal officers before the passing of that Act, is thereby transferred to the Provincial Government.

Her Majesty's Secretary of State for the War  
Department v. The Great Western Railway  
Company, ..... 503.

OVER PAYMENTS.

(DECREE TO RESTORE.)

See "Township Council," 1, 2.

PAROL CONTRACT.

See "Specific Performance," 3, 5, 6.

PAROL EVIDENCE.

See "Mortgage," &c., 13.

PARTIES.

1. To a bill by an execution creditor of two joint debtors to set aside conveyances by one of them, as fraudulent and void against creditors, the grantor was a defendant.

*Held*, that if the grantor was a necessary party, his co-debtor should be a party also.

*Pyper v. Cameron*, 131.

2. Where in a bill for partition it was stated that certain infants residing with or near their father, out of the jurisdiction of the Court, not parties, were interested in the lands sought to be partitioned, their father being a party defendant, a demurrer for want of parties was allowed.

*Tryon v. Peer*, 311.

3. A. who was domiciled in Scotland, died there intestate, leaving some personal property. Three of his next of kin, a brother and two sisters, concurred in appointing an agent in Scotland to wind up the estate and transmit and account to them therefor; the agent did so, and transmitted to the brother some money and personal chattels as all that remained after paying the intestate's debts and funeral expenses. The brother paid the sisters their shares of the money, but kept all the chattels. In a suit by the sisters for a division of these, an objection taken to the absence of any personal representative of the deceased in this country, was over-ruled.

Sutherland v. Ross, 507.

4. A municipal corporation after raising money on the credit of the Municipal Loan Fund for a purpose specified in the by-law, passed another by-law diverting the debentures to another purpose; and under this second by-law the debentures passed into the hands of the Bank of Upper Canada:

*Held*, that a bill would lie by a ratepayer on behalf of himself and all other ratepayers of the municipality, against the Bank and the municipal corporation, for the restoration of the debentures to the corporation; and a demurrer, on the ground that the Attorney General was not a defendant, was over-ruled-

Brogdin v. The Bank of Upper Canada, 544.

5. A suit will lie by an individual corporator complaining of an illegal diversion of the funds which the corporation holds as trustee, though the plaintiff may himself have no pecuniary interest in the funds so alleged to have been diverted; but he must sue on behalf of himself and all other corporators.

Armstrong v. The Church Society of the  
Diocese of Toronto, .....552.

See also "Specific Performance," 10.

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## PARTNERSHIP.

1. A testator's direction to his executors to continue to carry on business with his surviving partners, does not authorise the executors to embark any new capital in the business.

Smith v. Smith, 81.

2. A. B. & C. were partners. Two of them, A. & B., before the expiration of the term, induced the third (C.) to agree to a dissolution, a valuation of the assets, and a settlement based on such valuation, under the false impression that A. was the partner who was to retire, and that the business was to be continued by B. & C., while the fact was that the object of A. & B. was to get rid of C., and to carry on the business without him:

*Held*, that, by reason of this deceit, the transaction was not binding on C., every partner being entitled to the utmost good faith by his co-partners in effecting a dissolution of the partnership and winding up its affairs, as well as in their previous transactions.

O'Connor v. Naughton, 428.

3. After the dissolution of a partnership, one of the partners claimed the greater portion of the partnership property as his own by reason of certain misconduct he charged against the plaintiff, and made use of the partnership property in carrying on business on his own account :

*Held*, that such proceedings were wrong, and entitled the other partner to a Receiver.

Doupe v. Stewart, 637.

4. Under the usual directions for taking partnership accounts, it is within the province of the Master to entertain and adjudicate upon a claim by one partner, for damages sustained through misconduct of the other, occasioning the dissolution before the expiration of the term agreed upon.—*Id.*

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## PARTITION.

In suits between joint owners for partition or sale, the costs are to be borne by the parties in proportion to their respective interests in the property ; except that in the case of partition the Court, if it sees fit, may give no costs to either party up to the hearing.

Cartwright v. Diehl, 360.

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## PATENT MEDICINE.

See "Alien Friends."

"Injunction," 6.

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## PATENT RIGHT.

The simplicity of an invention is no reason why a patent in respect thereof should not be protected : where, therefore, by a simple contrivance of cutting away a portion of the log out of which a pump was to be manufactured, thus giving it the form of a chair ; and by the introduction into the tube of a conical tube through which the piston worked, the plaintiff had been enabled to construct a force-pump made of wood, for which he had procured a patent of invention, the Court restrained the infringement of the patent.

Powell v. Begley, 381.

## PAYMENTS.

See "Executors," 3.

(OF MONEY OUT OF COURT IN MISTAKE.)

See "Decree," 2.

## PER CAPITA AND PER STIRPES.

See "Will," 9.

## PERSONAL REPRESENTATIVE.

See "Specific Performance," 9.

[DISPENSING WITH SERVICE OF.]

A life policy was assigned to one F., absolutely, who afterwards left the country. The insured died insolvent, and no one administered to his estate. The plaintiffs claimed the assurance money, alleging that the assignment had been made in trust for them, to secure a larger sum owing to them by the assignor. The Insurance Company declining to pay the amount to the plaintiffs, they filed a bill to compel payment, and moved under the general order, No. 30, (June, 1853), that they might be at liberty to proceed without a personal representative to the estate of the insured; but the Court held the case was not within the order.

The Toronto Savings Bank v. The Canada Life Assurance Company.....171.

(DOMICILED OUT OF JURISDICTION.)

See "Parties," 3.

## PERSONAL RIGHT.

See "Mineral Lands," 1.

## PERSONAL SKILL.

See "Mineral Lands," 3.

## PETITION.

(UNDER 29 VICTORIA, CH. 28.)

See "Construction."

## PLEADING.

To a bill by an execution creditor to set aside as fraudulent against creditors, two distinct conveyances executed at different

times to two separate grantees, the two transfers having no connexion with one another,—a demurrer for multifariousness was allowed.

Pyper v. Cameron, 131.

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POSSESSION.

See "Vendor and Vendee," 3.

(ORDER FOR DELIVERY OF.)

See "Delivery of Possession."

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PRACTICE.

1. Where a rule for setting aside a *fi. fa.* against lands was discharged at law under a material error as to the facts :

*Held*, no bar to relief in equity, at the suit of the debtor's grantee of the lands.

Paton v. The Ontario Bank, 107.

2. In litigating with third persons, executors are with respect to costs, in the same position as parties who litigate in their own right.

The Great Western Railway Co. v. Jones, 355.

3. Executors are usually entitled to their costs as between solicitor and client out of the estate; and if the executors, in addition to the costs of the suit, have incurred any other costs, charges, and expenses in the administration of the estate, on this fact being stated to the Court, but not otherwise, an inquiry will be directed, and the Master will be authorized to include them in his account.

Story v. Dunlop, 375.

4. Where an executrix appealed against the Master's report, and the appeal was allowed without costs :

*Held*, that she could not, on further directions, claim the costs of the appeal out of the estate.—*Ib.*

5. Where an *ex parte* injunction is granted before the bill is served, an office copy of the bill should be served with the injunction, or as soon as possible afterwards.

Heron v. Swisher, 438.

6. Where an *ex parte* injunction was served 24th December, and the bill was not served up to the 13th of May following, the injunction was dissolved for the neglect to serve.—*Ib.*

7. The defendant, by his answer, set up a compromise and settlement of the plaintiff's claim, and proved the same at the hearing; whereupon the plaintiff asked liberty to amend, for

the purpose of impeaching this settlement. The Court granted the leave on payment of costs, but without the right to use again the evidence which had been taken in the cause.

McIntyre v. Cameron, 475.

8. An appeal from an order made in Chambers was set down to be heard for a day falling within the time appointed for examination and hearing term. This was *held* irregular; and on that ground the case was struck out of the paper with costs.

Armstrong v. Cayley, 558.

9. In a foreclosure suit, where the mortgagor is the only defendant, and an immediate decree is taken against him, by consent, without any reference or day of payment, a reference cannot be directed as to other incumbrancers not named in the bill.

Taylor v. Ward, 590

10. The defendant cannot defeat a motion for a Receiver by a general affidavit that he has a good defence to the suit; he must specify the defence distinctly to enable the plaintiff to meet it, and the Court to judge of it.

Aikins v. Blain, 646.

11. Where a party to a suit examines a witness at the hearing, the party calling him cannot afterwards exclude his testimony from the consideration of the Court.

Vannatto v. Mitchell, 665.

12. In prosecuting a claim to land before the referee of titles, a contestant, served with notice, will not be prevented from asserting his rights until payment of costs of proceedings instituted by him against the claimant, in respect of the property in question, ordered to be paid by the contestant.

Shepherd v. Hayball, 681.

See also

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|---------------------------|----------------------------|
| "Amendment of Bill."      | "Lunacy."                  |
| "Appeal from Master."     | "Mortgage," 2, 5.          |
| "Apportionment of Costs." | "Notice of Motion."        |
| "Collateral Issue."       | "Personal Representative." |
| "Delivery of Possession." | "Reading Answer."          |
| "Evidence," 1.            | "Second Suit."             |
| "Foreclosure."            | "Sheriff's Sale, 5.        |
| "Infants."                | "Solicitor and Client."    |
| "Injunction," 3, 5.       | "Supplemental Answer."     |

PREFERENCE.

See "Insolvency," 4.

PRINCIPAL AND SURETY.

1. A debtor gave a mortgage to his creditor as collateral security for a debt for which another person (H.) was surety. The creditor afterwards obtained judgment against the surety (H.) for the debt, and placed an execution in the Sheriff's hands against his goods. A creditor of the surety subsequently placed an execution in the same Sheriff's hands; and, there not being goods enough to pay both executions, he paid off the first execution and took an assignment of the mortgage :

*Held*, that he was entitled to hold the mortgage to the extent of such payment, as against the plaintiff to whom the surety (H.) after both executions were delivered to the Sheriff, had assigned his interest in the mortgage to secure another debt.

Garrett v. Johnstone, 36.

2. Accommodation indorsers, after the note on which they were liable had matured, filed a bill against the holder and maker to enforce payment by the latter; the relief prayed was granted, and the maker was ordered to pay the costs both of the plaintiff and of the holder of the note.

Cunningham v. Lyster, 575.

PROFITS.

(ACCOUNT OF.)

See "Injunction," 6.

PROVINCIAL FRONTIER.

*Held*, on demurrer, that the words "provincial frontier," used in section 5 of 20 Victoria, chapter 7, referred to the provincial frontier opposite the United States, and not to the boundary line of division between Upper Canada and Lower Canada.

Smith v. Ratté, 696.

PUBLIC SECURITIES.

Where a testator authorises his executors to invest the surplus of his estate in public securities :

*Held*, that municipal debentures were not thereby authorised

Ewart v. Gordon, 40.

## PURCHASE FOR VALUE.

A person who purchases land from the heir with notice of the terms of the will, but under an erroneous supposition that, according to the true construction of the terms, the land was not affected by it, cannot set up, as against claimants under the will, the defence of a purchaser for value without notice.

Smith v. Bonnisteel, 29.

## RAILWAYS.

Land purchased and used by the Toronto and Hamilton Railway Company, but not paid for or conveyed, does not vest in the company in fee simple absolute by force of the Upper Canada Act 4 Wm. IV., chapter 29.

Her Majesty's Secretary of State for the  
War Department v. The Great Western  
Railway Co., .....503.

## RATEPAYER.

(ONE SUIING ON BEHALF OF HIMSELF AND ALL OTHERS.)

See "Parties," 4.

## READING ANSWER.

A defendant, by his answer, admitted that he was devisee as alleged in the bill; but added that his right to deal with the property had been taken away by a suit for administration in England.

*Held*, that the latter statement was not an explanation of the former: and that the admission as to the will might be read by the plaintiff as evidence without making evidence of what followed that admission.

Stickney v. Tylee, 193.

## REAL ESTATE—AFTER ACQUIRED.

See "Will," 8.

## RECEIVER.

See "Mortgage," &c., 14.

"Partnership," 3.

"Practice," 10.

## RECTOR.

(LEASE BY.)

By letters patent dated in January, 1824, certain lands were granted to three parties upon the trust, amongst others, to convey the same to the Incumbent, whenever the Governor should erect a parsonage or rectory in Kingston and duly appoint an incumbent thereto, such conveyance to be upon trusts similar to those thereinbefore expressed. In January, 1836, a rectory was created in Kingston. In May, 1837, the trusts for which the patent of 1824 had been issued, having been carried out, and one of the trustees named therein appointed Rector, the other two joined in a conveyance to him as such Rector, to hold to him and his successors, subject to the uses and trusts set forth in the grant to them. In 1842, this Incumbent created a lease for twenty-one years (under which the plaintiffs claimed), whereby he covenanted for himself and his successors to pay for certain improvements made by the lessee on the premises, or that he or they would execute a renewal lease on terms to be agreed upon, and that until such payment for improvements or renewal of lease, the lessee should retain possession of the premises.

*Held*, that the Incumbent either as Trustee or Rector had no power to bind his successors to pay for improvements, or to enter into any agreement which *a priori* would extend the lease beyond the twenty-one years.

*Held also*, that the mere demand of rent by the successor of the lessor, (after the expiration of the twenty-one years) was not such an affirmance of the covenants in the lease as could estop him from disputing them.

Kirkpatrick v. Lyster, 323.

## REGISTRATION.

1. Registration is now notice of all instruments registered before, as well as since, registration was made notice.

Vance v. Cummings, 25.

2. Since the passing of the Consolidated Statutes, registration of a mortgage of unpatented lands under the Statute 8 Victoria, ch. 8, sec. 9, is notice to subsequent purchasers, whether the patent has issued under or without a decision of the Heir and Devisee Commissioners.—*Id.*

3. Express notice of an unregistered assignment of unpatented land has the same effect as like notice of an unregistered conveyance after patent issued.

Goff v. Lister, 405.

## REMUNERATION.

See "Township Council," 1, 2.

## RENEWAL.

See "Rector."

## RESIDUARY DEVISE.

See "Will," 6.

## RESTS.

See "Trusts," &c., 2.

## SALE.

(DEVISE IN TRUST FOR.)

See "Executors," 4.

"Judgment Creditor," 1.

[BY SHERIFF.]

See "Sheriff's Sale."

## SECOND SUIT.

(FOR SAME PURPOSE.)

A bill having been filed by one of the *cestuis que trust* of a settlement to enforce the trusts thereof, the defendant denied that the plaintiff had any interest under the settlement. Thereupon, by the advice of counsel, a bill was filed for the same purpose by another of the *cestuis que trust* against whom the objection did not apply, and he being an infant, the plaintiff in the first suit was named as his next friend. Both suits proceeded to a hearing, when the Court consolidated them, making one decree as prayed, and giving the plaintiff in the second suit his costs.

Roseburgh v. Fitzgerald, 386.

## SECURITY ON ASSETS OF ESTATE.

See "Executors," 1.

## SEPARATE ESTATE.

(OF WIFE.)

See "Will," 3.

## SEPARATION.

See "Husband and Wife."

## SERVICE OF BILL.

See "Practice," 5, 6.

## SET OFF.

P. owed R. two debts; one secured by mortgage, and one unsecured: and P. had a counter claim against B. P. executed a subsequent mortgage in favor of R., who filed a bill to redeem B.'s mortgage. Up to the time of filing the bill there had been no act appropriating the counter claim to either the secured or unsecured debt, and both the counter claim and the unsecured debt had become barred by the Statute of Limitations:

*Held*, that the plaintiff was not entitled to set off the counter claim against the mortgage debt.

Ross v. Perrault, 206.

*Quære*, whether, if a Bank was responsible for goods under circumstances which prevented a set-off at law, that relief could be had in Equity.

Clark v. The Bank of Montreal, 211.

See also "Mortgage," &c., 7.

## SHERIFF'S SALE.

1. A Sheriff to whom a writ against lands is delivered for execution, should make reasonable inquiries as to what property the execution debtor has, and what interest in it he possesses; should not advertise more of the estate than he finds the debtor is interested in, and if he knows what the debtor's interest is, he should give such statement of it in the advertisement as a provident owner would; and in regard to these matters he is not justified in acting irregularly by the instructions of the plaintiff's attorney against his own judgment.

McDonald v. Cameron, 84.

2. A third person who purchases and gets the Sheriff's deed is not affected by irregularities on the part of the Sheriff, unless the circumstances are such that the purchaser's taking the deed can be said to amount to a fraud.—*Id.*

3. If the execution creditor purchases as either principal or agent, and it appears that he or his attorney interfered with the conduct of the sale by the Sheriff, and that through such interference the sale was not properly advertised or conducted, and took place under circumstances of disadvantage to the debtor, the sale cannot be maintained except as a security for

the debt, provided the question of the validity of the sale is presented for adjudication without delay, and before the property has passed into the hands of a third party.—*Id.*

4. Two executions against lands were in the hands of the Sheriff, and the Sheriff had advertised a sale under the first writ. On the morning of the intended sale the Sheriff was directed not to proceed with it, and accordingly the sale did take place :

*Held*, that the first execution was thereby postponed to the second : the direction to the Sheriff being peremptory, although it was given for no fraudulent purpose, and although in giving it there was no intention of abandoning the seizure.

The Trust and Loan Company v. Cuthbert, 412.

(PURCHASE BY MORTGAGEE AT)

5. The plaintiffs filed a bill for foreclosure. The defendants set up that they were absolute owners of the property by virtue of a tax sale and the proceedings in a foreclosure suit. Both defences failed ; and the defendants therefore claiming at the bar that the plaintiffs should redeem the prior mortgage, the Court granted a reference in such terms as would enable the defendants to establish that claim, if well founded, in the Master's office.

Jones v. The Bank of Upper Canada, 201.

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SOLICITOR'S BILL.

On the common order by a client to tax his solicitor's bill, the Master may take into consideration alleged negligence of the solicitor as having occasioned the suit or rendered it useless, and therefore constituting a ground for disallowing the whole bill ; or may consider negligence as affecting parts of the bill, and affording a ground for disallowing such parts.

Thomson v. Milliken, 104.

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SOLICITOR AND CLIENT.

(COSTS BETWEEN.)

1. Where a creditor filed a bill impeaching conveyances made by the debtor as fraudulent against creditors, and the relief prayed was granted at the hearing : the Court ordered the difference between party and party, and solicitor and client costs, to be paid *pro rata* by such of the creditors as might avail themselves of the benefit of the suit, for the purpose of obtaining payment of their demands.

Pegg v. Eastman, 137.

2. In a suit of foreclosure on a mortgage taken by a solicitor from his client to secure advances and costs, the Court refused to direct a taxation of the costs; there being no over-charges pointed out, or any undue pressure shewn.

Shaw v. Drummond, 662.

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### SOLICITOR'S LIEN.

A solicitor having a lien on certain title deeds as against his client, for costs generally, was subsequently employed by another person to prepare a mortgage from such client, when his professional connection with the mortgagee ceased. A second mortgage was created in favor of another person. On default in payment of the money secured by such second mortgage, the mortgagee sold the estate under a power of sale contained in the mortgage.

*Held*, that the lien of the solicitor upon the title deeds in his possession, as against the mortgagor, continued as against the purchaser.

Gill v. Gamble, 169.

[Affirmed on re-hearing.]

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### SPECIFIC PERFORMANCE.

1. A testator devised his real estate in trust for sale; shortly after his death a friendly suit was instituted in the Court of Chancery in England, for the administration of the estate, to which suit the trustee was a defendant; in this suit an order was made for the appointment of a Receiver to collect the assets in Canada, and sell the lands there; after the death of a Receiver appointed under this order, the agents of the trustee in Canada, who had managed the estate for the deceased Receiver, continued to collect the assets and make sales, with the knowledge and concurrence of the trustee and the parties in England.

*Held*, that such sales were not void, and would be enforced or not, according as to this Court appeared, in view of the circumstances, to be proper; and a decree was made for the purchaser in respect of the sale in question.

Stickney v. Tylee, 193.

2. The owner of vacant land leased part of it for nine months at a nominal rent. The lessees covenanted to sink on the land, during the term, a test well to the depth of 1000 feet, for the purpose of obtaining oil: and it was provided that at any time during the term, the lessees should have the option of purchasing, and the lessor should convey to them, on their request, any five acres of the demised land at \$12 a lot; and that at

the end of the term the lessees should have the option of purchasing the residue at the same price. The lessees did set about making the well, but the machinery broke after they had reached a depth of 530 feet, and they were in consequence unable to complete the well during the term, though they expended as much as, but for the accident, the well would have cost to complete ; and the work had enabled the lessor to sell a large number of his other village lots at advanced prices. There was no charge of any want of good faith or diligence or skill on the part of the lessees. They gave notice, before the end of the term, that they would take the five acres.

*Held*, on appeal, affirming the judgment of the Court below, that the lessees were entitled to a specific performance of the covenant as to the five acres, notwithstanding the noncompletion of the well to the stipulated depth ; without prejudice to any action by the lessor on the covenant.

Hunt v. Spencer, 225.

3. On an appeal from a decree of the Court below for specific performance of a parol contract, it appeared that the defendant denied that there was any contract for sale, and alleged that the plaintiff was in possession as tenant merely and not vendee ; that the contract sworn to by the plaintiff's witnesses was not the contract alleged by the bill, and the evidence of there having been any contract was contradictory ; and the learned Judge who pronounced the decree had intimated considerable doubt as to the evidence, the decree was reversed, and the bill in the Court below ordered to be dismissed, but under the circumstances without costs.

Grant v. Brown, 256.

4. The plaintiff was lessee of some ordnance lands, and assigned his interest therein to the defendant in 1847, the latter agreeing in consideration of such assignment to pay off an execution against the plaintiff, then in the Sheriff's hands ; and if the Ordnance Department would give the defendant a deed in fee of the lot or a lease renewal in perpetuity at the then rent, to release a mortgage he had against the plaintiff on other land. The department refused to do either, but eleven years afterwards sold the land to the defendant at a price greatly exceeding the sum of which the rent would be the interest at six per cent. The bill was for the discharge of the mortgage, and the decree of the Court below dismissing the bill was affirmed on appeal.

McKenzie v. Yielding, 259.

5. A contract was entered into for a lease, and the intended lessee on the faith thereof entered into possession, paid rent, and made improvements. Both parties died without executing

any writing stating the bargain, and before any dispute as to the same arose. On a bill by the representatives of the intended lessee for specific performance, the parol evidence was not alone sufficient to establish clearly the terms of the transaction; but there being found among the papers of the intended lessor, (a County Court Judge), an unexecuted lease in his own hand-writing, the Court was satisfied that this paper contained the terms of the lease bargained for; and a specific performance having been decreed in Chancery, the decree was affirmed on appeal.

McFarlane v. Dickson, 263.

6. Lands were conveyed to W. upon the express understanding and promise that he would re-convey a certain portion thereof. *Held*, that W. was bound to re-convey.

Clarke v. Eby, 371.

7. The owner of an oil well lot, on which was also situate a blacksmith's shop, which was known not to be the property of the owner of the land, agreed to lease the oil well and lot for a term of years without any express reservation of the blacksmith's shop; the intended lessee insisted on obtaining a lease without any reservation of such shop, and filed a bill for that purpose. At the hearing the bill was dismissed with costs.

Morris v. Kemp, 487.

8. The owner of land agreed to sell a site for a burial ground and church in connection with the Free Church of Scotland, if a congregation thereof could be gotten together. A church was built thereon, and a congregation in connection with the Free Church assembled and performed Divine service therein. Several years afterwards the great body of the congregation abandoned their connection with the Free Church; and they, in conjunction with the vendor, assumed to hold possession of the church to the exclusion of such of the members as continued to adhere to the Free Church. On an information filed in the name of the Attorney General:

*Held*, that although at first conditional, the contract, by reason of a congregation having assembled in the church, had become absolute and that so long as even one member remained to claim the site and church on behalf of the Free Church, the right of that body continued, notwithstanding the change of opinion in the body of the members:—and, under the circumstances, decreed an injunction restraining any further interference with such right, and also a specific performance of the contract, with costs.

The Attorney General v. Christie, 495.

9. A purchaser of real estate paid a portion of the purchase

money during the life-time of the vendor, and after his decease paid the balance to his personal representatives: none of the heirs-at-law were infants, but they refused to execute a conveyance to the purchaser who filed a bill against the real and personal representatives for specific performance. The conduct of the personal representatives was shown to have been correct, and the Court in making the decree asked, ordered the plaintiff to pay the personal representatives their costs; but gave the plaintiff his costs of suit against the heirs-at-law; not against the estate of the vendor.

### Addaman v. Stout, 692.

10. Where it is clear that a purchaser of real estate has paid all his purchase-money, whether it is necessary, in a suit for specific performance against the heirs-at-law of the vendor, to make the personal representatives parties to the bill therefor. *Quære.—Ib.*

In such a case it would seem sufficient to add the personal representatives as parties in the Master's office.—*Ib.*

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### SUPPLEMENTAL ANSWER.

Where on a bill for the cancellation of a Sheriff's deed as a cloud on the legal title of the plaintiff, the defendant omitted to set up by his answer one of his grounds of defence; the Court at the hearing, though against the defendant on the grounds taken by the answer, declined to make a decree in the plaintiff's favor until the other defence was tried; and on payment of costs allowed a supplemental answer to be filed, setting up the omitted defence.

### McKinnon v. McDonald, 152.

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### SURPRISE.

See "Chancery Sale."

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### TAX TITLE.

Where a party relies on a tax sale, it is not sufficient in equity, any more than at law, to produce the Sheriff's deed. There must, amongst other things, be the proper legal evidence of the taxes having been in arrear for the necessary period; and such evidence is not dispensed with by the act of 1863 (Ch. 19).

### Jones v. The Bank of Upper Canada, 74.

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### TIMBER—RIGHT TO CUT.

See "Lease," 2.

## TIMBER TRADE.

A merchant agreed to advance money for the purpose of manufacturing timber, to be forwarded to him at Quebec for sale, for which advances he was to be paid certain commissions; having in his discretion held the timber over until the following spring, he claimed interest on his advances until the timber was sold:

*Held*, on appeal from the report of the Master, that he was not entitled to any further allowance than the commissions stipulated for: and the fact that it was shewn that interest under like circumstances had in several instances been charged and paid, was not sufficient to bind any one entering the trade, contrary to the express agreement of the parties.

De Hertel v. Supple, 648.

[Since re-heard and stands for judgment.]

## TITLE.

(BY POSSESSION.)

See "Vendor and Vendee," 1.

(WAIVER OF INQUIRY AS TO).

See "Vendor and Vendee," 3.

## TOWNSHIP COUNCIL.

1. In 1854, a Township Council passed a by-law for remunerating the councillors for their attendance at the council, at the rate of \$20 a year. In 1859, and thenceforward, by-laws were passed providing for the further sum of \$10 a year for each councillor for letting and inspecting the roads, in addition to the \$20. The by-law passed in 1866, was moved against and quashed by the Court of Queen's Bench, as illegal. On a bill by a ratepayer, filed in the same year, the Court ordered the members who were defendants, to repay to the corporation the \$10 a-year they had respectively received; but held, that the ratepayers were not entitled to a decree restoring the sums actually paid for the years between 1859 and 1865,\* except to the extent that such payments exceeded the statutory limit.

Blaikie v. Staples, 67.

\* [But see as to Statute Limitations, *St. Vincent v. Grier*, 173.]

2. A Councillor or Reeve of a Township is entitled as compensation for his services to the *per diem* allowance provided for by the Statute only; and any over-payments may be recovered back by the municipality; the word "Officer" used in the Statute not applying to the Reeve or a Councillor, as

parties to whom compensation is to be voted by the council: he will be entitled, however, to receive from the municipality payment for moneys out of pocket, advanced by him on account of the business of the municipality.

St. Vincent v. Greer, 173.

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### TRADE MARK.

See "Alien Friends."

"Injunction," 1, 8.

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### TRADE SIGN.

See "Injunction, 4.

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### TRIAL BEFORE COURT.

See "Lunacy."

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### TRUSTS, TRUSTEES, AND CESTUIS QUE TRUST.

1. A married woman owning land, she and her husband contracted for the sale thereof, but the deed executed to the purchaser was a conveyance by the husband only with a bar of dower by the wife. The error was not discovered until after the property had been disposed in parcels and passed into other hands. The original owner and her husband then executed for a nominal consideration a deed conveying the property absolutely to one of the parties interested, but under the belief that the only effect of such second deed was to remove the defect in the first deed, and to confirm the title of all parties claiming thereunder. On a bill by one of these parties and the grantor (the husband being dead) Vice-Chancellor Esten decreed the grantee in the second deed to be a trustee for all the parties interested, and this decree, on appeal, was affirmed with costs.

Grace v. McDermott, 247.

2. The principle on which trustees are liable to be charged with an increased rate of interest, or interest with annual rests considered and acted on.

Wightman v. Helliwell, 330.

3. Where a trustee had retained moneys of the estate in his hands instead of paying off debts of the estate, and had improperly mixed these moneys with his own at his bank, the Court without saying what in future, according to the value of

money or the amount of interest payable on investments, might be a fair rate to charge on moneys improperly withheld or used by a trustee, charged the trustee with interest at eight per cent on all balances in his hands.—*Id.*

4. In a suit against a trustee to carry out the trusts of a deed for the benefit of creditors, a payment to the plaintiff was proved by the evidence of the trustee only; although this was considered sufficient to discharge the estate from liability in respect of this sum, still he could not thus discharge himself from liability for the amount to the plaintiff.—*Id.*

5. When one of the trustees was dead and another was removed for misconduct, the remaining trustee was held to be entitled to be discharged from the trust.

Mitchell v. Ritchey, 445.

6. Where the trustee for infants resided out of the jurisdiction and a person resident within the jurisdiction had a contingent interest in the trust fund, the fund was ordered to be secured in Court, instead of being paid over to the trustee.

Stileman v. Campbell, 454.

See also "Executors," 1, 2, 3, 4, 5.

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### UNDERTAKING.

See "Decree," 1.

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### UNDUE INFLUENCE.

A younger son who was entitled to a large estate, under the will of his father, shortly after coming of age purchased from a step-brother,—twenty years his senior, and who was in greatly embarrassed circumstances,—the equity of redemption in fifty acres of land, the mortgages on which he was to pay off out of the purchase money. Shortly afterwards the purchaser left this country for the United States of America, where he resided for some years, during which time the mortgagees had foreclosed the equity of redemption on default of payment.

The purchaser, having returned, filed a bill impeaching the transaction, on the grounds of undue influence on the part of the vendor and excess in price. On the hearing the evidence failed to establish the fact of undue influence, and the evidence as to value being contradictory, the bill was dismissed with costs.

Denison v. Denison, 114.

[Affirmed on re-hearing Mowat V.C. dissenting, 596.]

## UNNECESSARY PARTIES.

Where unnecessary parties were made to an administration suit, the Court refused to burden the estate with any of the extra costs thereby occasioned.

Rodgers v. Rodgers, 457.

## UNPATENTED LANDS.

See "Registration," 2, 3.

"Unregistered Assignment."

## UNREGISTERED ASSIGNMENT.

A purchaser from the Crown assigned his contract for a valuable consideration duly paid. The assignee died soon afterwards without having registered his assignment, and the assignor subsequently executed an assignment to another person for a trifling sum, the second assignee having had express notice of the prior sale; but he registered his assignment and obtained the patent:

*Held*, that he took, subject to the rights of the heirs of the first assignee.

Goff v. Lister, 406.

[Since re-heard and stands for judgment.]

## VENDOR AND VENDEE.

1. Where a vendee takes possession of the property with the knowledge and concurrence of the vendor, and pays his purchase money, he is to be regarded as in possession of the whole lot, and not merely of such part of it as he may actually occupy and improve; and after twenty years' possession by him and his successors, the title of the vendor will be extinguished.

McKinnon v. McDonald, 152.

2. Where a purchaser takes possession before conveyance he is liable to interest from the time of taking possession, and the liability is not limited to a period of six years.

The Great Western Railway Co. v. Jones, 355.

3. A purchaser before the time appointed for the completion of a contract for the sale of land, and while the investigation was in progress went upon and cleared a portion (about two or three acres,) of the land sold, and sowed the same with turnip

seed which it was necessary to do at the time or lose the whole season; he did not, however, harvest the crop, but abandoned the possession entirely, in consequence of objections to the title not being removed:

*Held*, no waiver of the purchaser's right of an inquiry as to title.

Mitcheltree v. Irwin, 537.

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VERBAL AGREEMENT.

See "Mortgage," &c., 3.

"Written Agreement."

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VOID DEVISE.

See "Will," 6.

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VOLUNTARY CONVEYANCE.

1. A conveyance by a man, 84 years of age, of his farm, which was almost his only means, to his married daughter, subject to a provision that she should properly maintain him, but with no personal liability on the part of any one to see to his maintenance, was held to be a deed of gift, and only sustainable by the same evidence as is necessary in equity to maintain a deed of gift.

Beeman v. Knapp, 398.

2. A like deed made two days afterwards to the grantor's son, who had managed the farm for some years along with farms of his own; the consideration for the conveyance being the son's personal bond, to maintain the grantor and his wife during the rest of their lives, without any other security:

*Held*, not valid unless shewn to have been made freely and voluntarily after independent and proper advice.

*Held*, also, that such a conveyance, unless made freely and voluntarily, after independent and proper advice, was not made good by evidence of a verbal agreement several years before, that the son should work the farm and maintain his father and mother in consideration of the property being left to the son by will; a deed and will being essentially different.—*Id.*

3. Voluntary conveyances are void against existing debts which are thereby defeated or delayed, whether the conveyances were fraudulent or not.

Irwin v. Freeman, 465.

## VOLUNTARY SETTLEMENT.

Where a debt. the remedy for which is barred by the Statute of Limitations, is acknowledged by the debtor, and judgment is recovered therefor, a voluntary settlement made before such acknowledgment and before the remedy was barred, is void as against a *fi. fa.* issued on the judgment.

Irwin v. Freeman, 465.

## VOLUNTARY TRANSFER.

See "Mineral Lands," 2.

## VOLUNTEER.

The Court will not, in favour of a volunteer, order the due execution of an instrument informally executed, although the relief would be granted in favour of a purchaser for value.

Ross v. Fox, 683.

## WAIVER.

(OF CONDITION.)

See "Lease," 1.

(OF INQUIRY AS TO TITLE.)

See "Vendor and Vendee," 3.

## WIFE.

(DEED OF TRUST FOR SUPPORT OF.)

See "Husband and Wife."

(SEPARATE ESTATE OF.)

See "Will," 3.

## WILL.

1. A testator, in an inartificially drawn will, directed his debts to be paid, and bequeathed to his wife, £125, to be paid her from the sale of his farm, which he required his executors to advertise and sell for the best price that could be obtained for it, and also retain possession, if she thought fit, in lieu of all dower and thirds, to have and to hold to her heirs and assigns forever. After giving legacies to his children, adding to each "to have and to hold to him, his heirs, executors, administrators, and assigns, for ever"—the testator willed and devised, that, should any assets remain in the hands of his executors after paying the foregoing devisees, the same should be equally divided between his sons and daughters named, share and share alike :

*Held*, that the direction to sell was for the benefit of all the legatees, and not of the wife only.

### Smith v. Bonnisteel, 29.

2. The will devised as follows:—"My farm being lot No. 15, in the first concession of the Township of Sidney"—this farm really consisted of this lot and the corresponding lot in the broken front concession:

*Held*, that the devise covered both lots.—*Id.*

3. Where a testator gave certain estates to trustees, in trust as to the income for the separate use of his daughter and her children for her life, with directions to pay the same to her, and in trust as to the capital after her death, to divide the same equally amongst her children: *Held*, that she was entitled during her life, for her separate use, to an equal share with each of her children; that the residue of the income was to be paid to her for their benefit; and that her own individual share was alone liable to her debts.

### Crawford v. Calcutt, 71.

4. A testator devised to his wife all his real and personal property during widowhood, under which she entered upon the real estate, and took and applied to her own use the personal property. Having married again, she and her husband instituted proceedings at law to recover dower in the real estate. The Court restrained the action for dower, holding that the widow was bound by the election she had already made to take under the will.

### Westacott v. Cockerline, 79.

5. A testator by his will directed his real and personal estate to be sold, and after investing sufficient to secure an annuity for his sister, directed the trustees "to pay over the balance of the moneys so to be received from all these sources to the treasurer or other receiving officer of such religious or charitable societies as in their judgment and discretion requires it," and after the death of his sister, the sum so invested for her benefit was to be disposed of by the trustees in like manner. On a bill filed to impeach this devise as within the statutes of Mortmain, the Court, as to so much of the property as was realty, directed an inquiry to ascertain whether there were any, and what society or societies, of the nature contemplated by the will that could properly take real estate.

### Anderson v. Dougall, 164.

6. A will contained a void devise of lands to charitable purposes, and then a residuary devise of the testator's lands not thereinbefore mentioned or disposed of:

*Held*, that the property comprised in the void devise passed to the heirs-at-law.

### Lewis v. Patterson, 223.

7. A testator devised certain land to his two sons; their heirs or assigns, or the survivor of them, when they attained the age of twenty-five years, to have and to hold the same, share and share alike forever, and directed that if the two sons should die without issue, before they inherited the property devised, their share to go to the survivors of the testator's children living at that time: one of the sons died under the age of twenty-five, without issue.

*Held*, that the surviving son, who attained the age of twenty-five, took the whole property.

### In re Charles McIntosh, 309.

8. A devise of all a testator's real estate passes all he owns at the time of his death.

### Whateley v. Whateley, 436.

[Since re-heard, and stands for judgment.]

9. A testator bequeathed certain personal estate to his two sisters M. and S., and to their children, all to share alike if living:

*Held*, that the sisters and their children took as tenants in common, sharing *per capita* and not *per stirpes*.

One of the sisters died before the testator:

*Held*, that her share lapsed.

### Bradley v. Wilson, 542.

See also "Construction"—"Executors," 4.

"Lost Will"—"Merger."

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## WRITS.

(PRIORITY OF.)

See "Sheriff's Sale," 4

## WRITTEN AGREEMENT.

On a division of real estate a written agreement was signed providing for the payment of \$1,100 to D. P., one of the parties interested, to make his share equal to the others :

*Held*, that evidence was inadmissible of a contemporaneous verbal agreement that the amount agreed to be so paid was \$1,800, part of the difference depending on a contingency.

Pherrill v. Pherrill, 476.

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